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Sup. Ct.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 312

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 18, 1946

CERTIORARI GRANTED OCTOBER 21, 1946

SUPREME COURT OF THE UNITED STATES

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THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY

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1 In the District Court of the United States for the District of Kansas, First Division

Civil—No. 4641

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Amended complaint

Filed April 14, 1942

For his cause of action herein against said defendant, plaintiff alleges and says:

1. Plaintiff is a citizen and resident of the State of Kansas, with his principal place of business and correct post office address located at 607 East 4th Street, Topeka, Shawnee County, Kansas. That plaintiff is an individual doing business as Albert Silk Coal Company.

2. This action arises under one of the Internal Revenue Laws of the United States, to-wit: Titles 8 and 9 of the Social Security Act, being 42 U. S. C. A. 1001 et cet'ra and 1101 et cet'ra.

3. The tax hereinafter referred to was paid to the Collector of Internal Revenue at Wichita, Kansas, and the Collectors to whom said tax was paid are now out of office and are no longer Collectors.

2 4. Plaintiff now is, and during all the times herein referred to, was, engaged in the retail coal business under the above name at the above address. That in the operation of said business, plaintiff has employed various persons from whom he has collected and paid all social security taxes as required by law, such persons being others than those hereinafter mentioned. Plaintiff owns no delivery trucks in connection with said business, and contracts with independent truck owner-drivers who own their own trucks and furnish their own help, tools, gasoline, oil and other supplies for the delivery of coal at an agreed price per ton, with extra compensation if the coal is to be wheeled to the bin at the place of delivery. Said trucks do not bear the name, telephone number or other insignia of this plaintiff, or of plain-

tiff's business, and plaintiff neither has nor claims the right to exercise any regulation or control over said independent truck owner-drivers, except as to the results obtained. That said independent truck owner-drivers are free to haul for anyone desiring their services, and do in fact haul for others than this plaintiff, and are free to come and go at their own pleasure. That a part of plaintiff's sales are made on a cash and carry basis, the customers purchasing the coal at plaintiff's yards and doing their own hauling.

Plaintiff also has his coal unloaded from freight cars by various unloaders who are available to plaintiff when the coal is received, and who work on their own time and furnish their own tools and are paid an agreed price per ton, without being under the direction or control of plaintiff, except as to the results obtained. That plaintiff neither has nor claims the right to exercise any regulation or control over the work of said unloaders, except as to the results obtained.

Neither the independent truck owner-drivers nor the coal unloaders above referred to are employees of this plaintiff as that term is used in Titles 8 and 9 of the Social Security Act, but that said defendant has charged this plaintiff with taxes under said act on both said independent truck owner-drivers and unloaders, and has required and compelled this plaintiff to pay said taxes, as more fully hereinafter stated. That the assessment of said taxes was and is wrongful and unlawful for the reason that such persons are not employees of this plaintiff, but are independent contractors.

5. On or about February 26, 1940, plaintiff filed with said defendant certain claims for refunds and for the abatement of further taxes, as follows:

Claim No. 100238—Schedule No. SST:VIII

Employers Excise Tax—Title 9—Social Security Act

January 1, 1936 to December 31, 1936	$136.19
January 1, 1937, to December 31, 1937	50.49
January 1, 1938, to December 31, 1938	60.09
January 1, 1939, to December 31, 1939	57.56
Total	304.33

January 1, 1939, to date (for abatement).

Sub-Chapter A of Chapter 9 of Internal Revenue Code and Title 8 of Social Security Act

January 1, 1937, to date

For period ended June 30, 1937	$113.80
For period ended December 31, 1938	134.56
For period ended March 31, 1938	76.24
For period ended June 30, 1938	11.58
For period ended September 30, 1938	15.98
For period ended December 31, 1938	82.36
For period ended March 31, 1939	74.80
For period ended June 30, 1939	11.34
For period ended September 30, 1939	14.76
For period ended December 31, 1939	75.80
Total	621.32

That said original claims are in the possession of said defendant, and therefore copies are not attached hereto.

Thereafter said claims made under Subchapter A of Chapter 9 and Title 8 of said act were partially allowed in the sum of $314.99, with accrued interest in the sum of $38.70, which sums were subsequently reimbursed to plaintiff, and plaintiff's other claims were denied.

Thereafter and on or about January 24, 1941, said defendant demanded of this plaintiff that plaintiff return said sum of $353.69 to said defendant, informing this plaintiff that said taxes had been reassessed to this plaintiff. On or about October 17, 1941, said defendant collected from this plaintiff by means of a tax warrant said some of $353.69 together with interest, penalty and costs in the sum of $32.10, or a total of 385.79. That said repayment to said defendant was not made voluntarily by this plaintiff.

6. Said defendant has now acquired this plaintiff to file reports on defendant's form SS 1 for the years 1940 and 1941 covering independent truck owner-drivers and unloaders above referred to, and by reason thereof has now assessed an additional tax against this plaintiff in the sum of $1,934.00 for the years 1940 and 1941, and is now demanding payment of said sum from this plaintiff, with interest, penalties and costs. That said assessment is wrongful and unlawful for the reason that such persons are not employees of this plaintiff, and are not within the terms and provisions of said law, as above set forth. That plaintiff has not collected from said independent truck owner-drivers that part of the tax which would have been due from them during the years 1940 and 1941, if such persons had in fact been employees of this plaintiff.

7. Under date of June 23, 1939, the Unemployment Compensation Division of the State of Kansas ruled that said independent truck owner-drivers and unloaders, being the same persons covered by the claims above referred to, were not employees of this plaintiff, and that plaintiff was therefore not liable to the state of Kansas for unemployment compensation taxes on such persons. That plaintiff therefore has not been making reports or paying the tax to the State of Kansas.

5 8. That said assessments were made against this plaintiff in addition to the levy of the taxes required by said law upon the persons in the actual employ of this plaintiff, and that plaintiff has reported and paid the tax on his actual employees, as required by said law.

9. Plaintiff is not subject to the provisions of said act nor liable for said tax on either the independent truck owner-drivers or the coal unloaders, for the reason that said persons are independent contractors and are not employees of this plaintiff. That the acts of said defendant as herein set forth are therefore erroneous and illegal, and deprive this plaintiff of his property without due process of law, and also denies plaintiff equal protection of the law as guaranteed under the due process and equal protection clause of Section 1 of the 14th Amendment to the Constitution of the United States.

10. By reason of the above facts and circumstances, plaintiff is entitled to recover forthwith from said defendant the total sum of $925.65 and interest, as represented by the claims filed against said defendant, and for the further sum of $32.10 to reimburse plaintiff for the interest, penalty and costs wrongfully demanded and collected from plaintiff by said defendant, and to have all subsequent taxes under said act abated insofar as it relates to said independent truck owner-drivers and unloaders, and that plaintiff is entitled to recover his costs herein, and all other proper relief.

Wherefore, plaintiff prays judgment herein against said defendant for the sum of $925.65 with interest and costs, and the additional sum of $32.10 as interest, penalties and costs wrongfully collected from this plaintiff. That this court abate all subsequent taxes from this plaintiff under said act insofar as the same

6 relate to said independent truck owner-drivers and unloaders; and that plaintiff have all other proper relief.

RALPH F. GLENN,
Topeka, Kansas,
Attorney for Plaintiff.

In United States District Court

Answer to amended complaint

Filed April 21, 1942

The defendant, by his attorney, Summerfield S. Alexander, United States Attorney for the District of Kansas, answers the amendee complaint herein alleged as follows:

I. Defendant admits the allegations contained in paragraphs 1, 2, and 3.

II. In answering paragraph 4 of the amended complaint, defendant does not have sufficient information upon which to form a belief as to the allegations contained therein and therefore neither denies nor admits the allegations and leaves the plaintiff to his proof, except that the defendant denies specifically that the assessment of taxes was and is wrongful and unlawful.

III. Defendant admits the allegations contained in paragraph 5.

IV. In answering paragraph 6 of the amended complaint the defendant alleges that the allegations contained therein are immaterial to this suit and therefore require no answer. It appears from the allegations contained therein that the plaintiff has not paid additional taxes for the years 1940 and 1941, and therefore it is immaterial that additional taxes have been assessed against the plaintiff for the years 1940 and 1941 and that the United States is now demanding payment of the additional taxes for the years 1940 and 1941 from the plaintiff.

7 V. In answering paragraph 7 of the amended bill of complaint the defendant alleges that the allegations contained therein are immaterial to this suit and therefore require no answer.

VI. Defendant denies the allegations contained in paragraphs 8, 9, and 10.

AFFIRMATIVE DEFENSE

As an affirmative defense the defendant alleges that this Court is without jurisdiction to grant the plaintiff's prayer that this Court abate all subsequent taxes due from this plaintiff under the Social Security Act insofar as the taxes relate to the independent truck owner-drivers and unloaders.

S. S. ALEXANDER,
United States Attorney,
District of Kansas,
Federal Building, Topeka, Kansas,
Attorney for Defendant.

In United States District Court

Findings of fact and conclusions of law

Filed March 16, 1945

Findings of fact

1. This cause was filed by Albert Silk, d/b/a Albert Silk Coal Company, Topeka, Kansas, as plaintiff, against the United States of America, as defendant.

2. The cause of action is for the recovery of taxes paid under one of the internal revenue laws of the United States, to-wit: Employers Excise Tax, Title IX, Social Security Act; and Subchapter A of Chapter IX of the Internal Revenue Code and Title VIII of the Social Security Act, which taxes were alleged
8 to have been erroneously and illegally assessed and collected by the Collector of Internal Revenue for the years 193[illegible], 1937, 1938, and 1939.

3. Plaintiff is a citizen and resident of the state of Kansas, with his principal place of business and correct post office address located at 607 East 4th Street in the city of Topeka. Plaintiff is an individual doing business as Albert Silk Coal Company. His business consists of selling coal at retail at the above address under the above name. Plaintiff owns no delivery trucks in connection with said business, but contracts with independent truck owner-drivers for the delivery of coal at an agreed price per ton. This expense is carried by plaintiff on his books under the title of "hauling." Said trucks do not bear the name, tele[illegible]e number or other insignia of plaintiff, or of plaintiff's business, and this is not required by plaintiff.

4. Plaintiff owns a piece of property upon which is located certain equipment consisting of coal bins and tracks where railroad cars full of coal are spotted, and also two office buildings opposite each other, and between which there is a driveway to the coal scales located thereon. Plaintiff uses one of these buildings as an office where he keeps his books and his bookkeeper, and the other building on the other side of this driveway is used by the truckers as herein stated.

5. The procedure followed by plaintiff in the operation of his business is as follows: A telephone call comes into the office where plaintiff or his assistant takes down the information, including the address, the amount of coal desired, etc., and where a duplicate ticket is made out for the order. Plaintiff or his assistant then rings a bell, which rings in the room or building on the other side of the driveway where these truckers are permitted to stay, if they desire, between deliveries. These truckers consist of a number of independent men, who own their own trucks, which they have

bought and paid for themselves. They are free to come and
9 go as they please, and actually do so. They reach the yard at indefinite times in the mornings, and leave whenever they desire in the evenings. They do not report in or out to plaintiff or his bookkeeper, and no record is kept of their time. The men buy their own gasoline, repairs, tires and oil, and own all the equipment on each truck, and also own their own shovels, forks, and wheelbarrows used for delivering coal. The plaintiff does not attempt to designate where these men shall buy their gasoline, tires, oil and other supplies and repairs, and has no right to do so. The truckers also furnish at their own expense any help they may need, without any direction or control by the plantiff. In addition to the hauling these truckers do for plaintiff, they also do hauling for outside parties when and as they desire, and upon such terms as they may determine. These truckers have voluntarily arranged a call list or board which they operate and maintain in the above room used by them. Plaintiff did not request that such a board be used by the truckers, and it is a plan developed by them. Their names come up in turn at the top of the list, and when plaintiff or his office assistant rings the bell, the trucker whose name is at the top of the list or board answers the bell and is offered the opportunity of making that delivery. If the trucker who is at the top of the list desires to make that particular delivery, he gets the order for the coal, but, if for any reason that trucker prefers not to make that delivery, he so informs the plaintiff and rejects the order, and the next man on the list is then offered that order for delivery. The order which is received from plaintiff or his assistant is simply a statement of the amount of coal, the kind of coal, and where it is to be delivered, and the price. The trucker takes the slip and drives his truck which he operates himself to the proper bin in the yard and loads it himself with the particular type of coal called for by the order. He then drives the truck to the address of the customer given on the order, where he delivers the coal, and puts it in the bin and cleans up the dirt incident to the delivery. Plaintiff does not designate the route to be travelled. The driver then either returns to the plaintiff's yard or goes home
for the day, or goes to any other place which he may desire.
10 He is not required to return to plaintiff's yard. If he does return to the yard, he is not required to do any work for the plaintiff while waiting for another delivery, and the time between deliveries is frequently occupied by reading or by playing cards with the other truckers who are also waiting.

6. According to the testimony of both the truckers and the plaintiff, the plaintiff exercises no control over the truckers. They report for work at such hours as they may wish, and they leave

when they wish, and they come and go absolutely independent of any regulations, rules or contracts with Mr. Silk. They simply congregate at the plaintiff's yard and take advantage of his facilities in the hope that they will get an opportunity to haul coal to his customers who telephone plaintiff for it. Plaintiff pays these truckers a uniform price per ton for delivering coal, which he pays out of the price which plaintiff receives from the customer. If the order is a C. O. D. the trucker delivers the coal and must collect the price and bring it into the office, but no time is specified when the trucker shall pay over the money, and, according to the testimony of the men, they sometimes keep the money on hand a couple of days before making a settlement in the main office. There are no terms of employment. The truckers are not hired or discharged formally in any way as those terms are used in trade or in business. The testimony is that these truckers come and go as they wish. If they desire to leave early, they may do so, and they do so without the permission of or notice to the plaintiff or his assistant. They are paid by plaintiff as they request it, sometimes after each trip, sometimes at the end of the day, and sometimes at the end of each week.

7. The evidence discloses that in addition to the hauling said truckers do for plaintiff, they very often also haul for other parties. The evidence discloses that said truckers at such times and on such terms as they may fix; haul grain, foodstuffs, furniture, coal, wood, rock, and other material for citizens of the community, and all of this is done without the authorization, interference or control of the plaintiff in any way whatsoever.

11 8. Under the evidence in this case, the plaintiff neither has nor claims the right to exercise any regulation or control over these truckers, and does not actually exercise any regulation or control over them, and they are not employees of plaintiff, but are independent contractors, within the meaning of said laws. There is no relationship of employer and employee existing between them. The uncontradicted testimony of witnesses called on both sides is that there is no relation of employer and employee between plaintiff and these men. He does not hire them. He does not fire them. He simply maintains an exchange or place where these truckers with their own trucks and equipment can come and obtain delivery orders from him.

9. Plaintiff has another class of workers called unloaders. These are men who come to plaintiff's place of business and unload coal from the freight cars into bins or onto the ground, as the case may be. The unloaders come to plaintiff's yard and if there is any coal to be unloaded they are assigned a railroad car to

unload and put the coal in designated places. These men work on their own time and furnish their own tools, and are paid an agreed price per ton. Plaintiff likewise does not hire these men or discharge them, and in no way controls their movements. They work as long as they wish, and quit when they wish, and are not under the direction or control of the plaintiff. Plaintiff neither has nor claims the right to exercise any regulation or control over said unloaders, and does not actually exercise any regulation or control over them, and the relationship of employer and employee does not exist between plaintiff and said unloaders. These men also work for others at such times and on such terms as they wish, without the knowledge or consent of plaintiff.

10. The Collector of Internal Revenue ruled that during the period from January 1, 1936, to December 31, 1939, said truckers and unloaders were employees of plaintiff within the meaning of said laws, and therefore assessed social security taxes and federal unemployment taxes against plaintiff covering said workers. Plaintiff then filed returns and paid said taxes to the Collector of Internal Revenue. Said collector is now out of office.

11. On or about February 26, 1940, plaintiff filed with defendant claims for refund of said taxes, as set forth in paragraph 5 in plaintiff's complaint herein.

12. Subsequently said claims for refund filed by said plaintiff were partially allowed by defendant in the sum of $314.99 with accrued interest in the sum of $38.70, which sums were then paid to plaintiff by defendant. Defendant disallowed the remaining part of plaintiff's claims for refund.

13. On or about January 24, 1941, the Collector of Internal Revenue reassessed to plaintiff taxes in the amount of $353.69 which had been refunded to plaintiff as above set forth, and, on or about October 17, 1941, defendant collected from plaintiff by means of tax warrants the reassessment of $353.69, together with interest, penalties, and costs in the amount of $32.10, or a total of $385.79.

14. Defendant has since required plaintiff to file reports covering said independent truck owner-drivers and unloaders above referred to, and defendant has also assessed additional taxes against said plaintiff on the theory that said persons were employees of plaintiff under the terms and provisions of said laws.

15. Plaintiff thereupon brought this action against defendant to recover the sum of $925.65 with interest and costs, and the additional sum of $32.10 as interest, penalties, and costs wrongfully collected from plaintiff by said defendant as above set forth.

13 *Conclusions of law*

1. Plaintiff is not subject to the provisions of said laws, nor liable for said taxes under either of the above provisions of said laws, on either the independent truck owner-drivers or the coal unloaders, for the reason that said independent truck owner-drivers and unloaders are independent contractors, and are not employees of plaintiff within the meaning of said laws. The ruling by the Collector of Internal Revenue that said workers were employees of plaintiff was and is erroneous.

2. The assessment against and collection of said taxes from plaintiff by the Collector of Internal Revenue was illegal and erroneous.

3. Plaintiff is entitled to recover judgment herein against said defendant, and said judgment should be for plaintiff in the amount of $1,131.49, with interest from December 13, 1943, at the rate of 6% per annum until paid, and for the costs of this action.

Dated this 13th day of December 1943.

J. FOSTER SYMES,
United States District Judge.

In United States District Court

Judgment

Filed March 16, 1945

And now on this 13th day of December 1943, this cause comes on for hearing in its regular order on the docket, the plaintiff being present in person and by his attorney, Ralph F. Glenn, and the defendant, United States of America, being represented by Harlow B. King, Assistant United States Attorney for the District of Kansas.

And thereupon, the plaintiff introduces his testimony and rests, the defendant introduces its testimony and rests, and counsel argue the cause to the Court.

14 And the Court, being fully advised in the premises, finds the issues generally in favor of the plaintiff and against the defendant and requests the plaintiff to prepare the proper findings of fact and conclusions of law upon which a judgment for the plaintiff may be decreed and entered.

And now on this 15 day of March 1945, this cause comes on for judgment and the Court makes findings of fact and conclusions of

law, the same being filed herewith and made a part hereof as fully as though copied herein.

It is therefore by the Court duly considered ordered, adjudged, and decreed that the plaintiff, Albert Silk Coal Company, do have and recover of and from the defendant, United States of America, judgment in the principal sum of $947.04, together with interest in the sum of $184.45 to and including December 13, 1943, being a total sum of $1,131.49, the same to draw interest at the rate of 6% from and after December 13, 1943, until paid.

It is further ordered that the defendant pay the costs of this action.

J. FOSTER SYMES, *Judge Assigned.*

In United States District Court

Stipulation re judgment

Filed April 13, 1945

Whereas, on the 15th day of March 1945, judgment was entered in the above entitled cause in a total sum of $1,131.49 with interest at the rate of six percent from and after December 13, 1943 until paid and that the defendant pay the costs of said action.

It is now stipulated and agreed by and between plaintiff and defendant through their respective counsel that only the principal sum of said judgment in the amount of $947.04 shall draw interest as provided in said judgment and said plaintiff hereby agrees that he will accept in full satisfaction of said judgment the sum of $1,131.49 together with interest on the sum of $947.04 from December 13, 1943 until paid.

It is further stipulated and agreed that the costs which
15 the defendant shall be required to pay in accordance with the provisions of said judgment shall not include any of the costs than those which may be legally assessed against the United States under the provisions of Section 258 of Title 28, U. S. C. A.

Dated this 11th day of April 1945.

RALPH F. GLENN,
Attorney for Plaintiff.
LESTER LUTHER,
Attorney for Defendant,
Assistant U. S. Attorney.

In United States District Court

Stipulation amending prior stipulation

Filed May 9, 1945

The stipulation herein entered into by and between the plaintiff and defendant on the 15th day of March 1945, is amended in the following particular:

By striking out all of paragraph two thereof and substituting for said paragraph the following: "It is now stipulated and agreed by and between plaintiff and defendant through their respective counsel that only the principal sum of said judgment in the amount of $947.04 shall draw interest as provided in said judgment and said plaintiff hereby agrees that he will accept in full satisfaction of said judgment the sum of $1,131.49 together with interest on the sum of $947.04 from December 13, 1943, computed to a date thirty days before the date of the refund check issued by the defendant in payment thereof."

Dated this 9th day of May 1945.

RALPH F. GLENN,
Attorney for Plaintiff.
LESTER LUTHER,
Assistant U. S. Attorney,
Attorney for Defendant.

16 In United States District Court

Notice of Appeal

Filed June 14, 1945

To ALBERT SILK and to RALPH E. GLENN, His Attorney of Record:

You and each of you are hereby notified that the defendant, United States of America, intends to and does hereby appeal from the rulings, orders and judgments made and entered in the above-entitled cause, and particularly the Findings of Fact and Conclusions of Law and the Judgment, entered as of March 15, 1945.

This appeal is taken from the District Court of the United States for the District of Kansas, First Division, to the Tenth Circuit Court of Appeals, as by law provided.

Dated at Topeka, Kansas, this 14th day of June 1945.

RANDOLPH CARPENTER,
United States Attorney,
District of Kansas.
LESTER LUTHER,
Assistant U. S. Attorney.
EUGENE W. DAVIS,
Assistant U. S. Attorney.

ACKNOWLEDGMENT OF SERVICE

The undersigned attorney for the plaintiff acknowledges service of the above and foregoing Notice of Appeal this 14th day of June 1945.

RALPH F. GLENN,
Attorney for Plaintiff.

In United States District Court

Statement of points on which Appellant intends to rely

Filed July 6, 1945

The points upon which defendant-appellant intends to rely on this appeal are as follows:

1. The Court erred in finding that the plaintiff neither had nor claimed the right to exercise any control over the truckers or over the coal unloaders, and did not actually exercise any control over them.

17 2. The Court erred in finding and holding that there was no relation of employer and employee between the plaintiff and the truckers, or between the plaintiff and the coal unloaders, and that the truckers and the coal unloaders were independent contractors.

3. The Court erred in holding that plaintiff is not liable for employment taxes under the Social Security Act and the Internal Revenue Code with respect to either the truckers or the unloaders.

4. The Court erred in holding that the assessment against and collection from the plaintiff of such taxes were erroneous.

5. The Court erred in holding that the plaintiff was entitled to recover judgment from defendant.

6. The Court erred in entering judgment in favor of plaintiff and against defendant.

7. The Court erred in failing to hold that the evidence disclosed an employment relationship between the plaintiff and the truckers, and between the plaintiff and the unloaders, within the meaning of Titles VIII and IX of the Social Security Act, and of Subchapters A and C of Chapter 9 of the Internal Revenue Code.

8. The Court erred in failing to hold that the taxes assessed against and collected from the plaintiff were lawfully and properly assessed and collected.

9. The Court erred in failing to enter judgment in favor of the defendant.

RANDOLPH CARPENTER,
United States Attorney.
LESTER LUTHER,
Assistant United States Attorney.

Service of copy of the foregoing Statement of Points upon me this 6th day of July 1945 is hereby acknowledged.

RALPH F. GLENN,
Attorney for Plaintiff.

18 In United States District Court

Designation of contents of record on appeal

The defendant-appellant in the above entitled cause hereby designates the parts of the record which it considers necessary in this appeal, as follows:

1. Plaintiff's amended complaint.
2. Defendant's answer to amended complaint.
3. Transcript of trial proceedings.
4. Stipulation of Facts.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Stipulation of April 10, 1945, to correct judgment.
8. Stipulation of May 9, 1945, to amend prior stipulation.
9. Notice of appeal.
10. This designation of contents of record on appeal.
11. Statement of points on which appellant intends to rely.

RANDOLPH CARPENTER,
United States Attorney.
LESTER LUTHER,
Assistant United States Attorney.

Service of copy of the foregoing Designation of Contents of Record on Appeal upon me this 6th day of July 1945 is hereby acknowledged.

RALPH F. GLENN,
Attorney for Plaintiff.

Filed in the District Court July 6, 1945.

In United States District Court

Order extending time for docketing cause

And now on this 13th day of July 1945, this cause comes on to be heard upon the Motion of the defendant for an Order of the

Court extending the time for filing the Record of Appeal and docketing the action in the Circuit of Appeals for the Tenth District.

And the Court, being fully advised in the premises, finds that said motion should be and the same hereby is sustained.

It is, therefore, by the Court duly considered and ordered that the time in which the Record of Appeal shall be filed and the action docketed in the Circuit Court of Appeals for the Tenth District be and the same hereby is extended to and including the 10th day of September 1945.

GUY T. HELVERING, *Judge.*

Filed in the District Court July 13, 1945.

In United States District Court

Transcript of trial proceedings

Filed July 7, 1945

Trial had before the Honorable J. Foster Symes, United States District Judge assigned, at Kansas City, Kansas, Monday, December 13, 1943.

Appearances: For the plaintiff, Mr. Ralph Glenn, Attorney at Law, Topeka, Kansas. For the defendant, the United States of America, Mr. Harlow B. King, Assistant United States District Attorney, District of Kansas, and Mr. John Fisher, Department of Justice, Washington, D. C.

The parties having announced ready, the cause proceeded as follows:

Opening statement for plaintiff

Mr. GLENN. I desire to make an opening statement for the plaintiff. Mr. Silk, Albert Silk, is a resident of Topeka, Kansas, and is engaged in the retail coal business located at 607 East Fourth Street in the city of Topeka. He has been located at that place for quite a number of years. Mr. Silk owns no trucks or trucking equipment of his own, and has his hauling done by what he considers independent haulers or truckers. It is our contention in the case that Mr. Silk employs independent truckers or contracts for independent truckers, rather, to do his hauling for him.

In 1939 rulings were handed down, and also in 1490 by the Internal Revenue Department to the effect that coal retailers that hired independent truckers or what they called hired truckers, or hired drivers, were not within the provisions of the Social Security Act. I might say at this time for the

benefit of the Court that the questions presented here are two: First, whether or not these men whom we call independent truckers or independent drivers——

The COURT. They own their own trucks?

Mr. GLENN. They own their own trucks, own their own equipment and so forth, whether they are independent contractors, or whether they are employees of Mr. Silk within the provisions of the Social Security Law. In addition to the truckers Mr. Silk has men who come in and out of his yard from time to time whom he pays by the ton, so much a ton to unload cars of coal that are set on the railroad sidings near his yard. He contends also these men are independent workers, and that they simply paid so much a ton to unload a car of coal from the car into some location in his yard. Those men also work on their own time, are paid by the ton, and furnish their own tools.

Now it is our contention that Mr. Silk neither has the right to exercise any control over those men, either the truckers or the unloaders, and actually exercises no control over them, so they are not employees, but they are independent workmen. Under the rule which controls the Social Security cases, that is the test as we understand it, is the normal test of whether or not the relationship is that of employer and employee.

The Social Security law sets up those specific standards by which that question is determined. In 1939 these rulings that were announced in other cases by the Department were distributed to other coal dealers, one of them dated July 1, 1939. There is one dated March 21, 1940, and another dated April 22, 1940, decision by Field Examiners or by the Internal Revenue Department represented in, whatever they call them, in similar cases. So in 1939 after that first decision came down, Mr. Silk made application first to the Kansas Unemployment Compensation Department for a ruling that he was exempt from the provisions of the state law and would not have to pay Social Security Tax or Unemployment Compensation Tax to the State of Kansas on these workmen. After a hearing before the Kansas board or department, a ruling was made that Mr. Silk was not the employer of these drivers or unloaders; and therefore these men were not employees and were not within the provisions of the Act.

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The COURT. Who made that decision?

Mr. GLENN. The Kansas Unemployment Compensation Board.

The COURT. The State Board?

Mr. GLENN. The State Board, yes, because there is a state law which is a sort of companion law with the Federal Act. Now at about the same time we took the matter up with the Internal Revenue Department at Topeka, first with Mr. Farrell, who was then in charge of the Topeka office or at least of this type of work

in the Topeka office, and later also took the matter up with the Wichita office of the Internal Revenue Department and filed claims for a refund of the taxes that had been assessed against Mr. Silk. The years in question so far as this case are concerned are a part of 1936, I believe, all of 1937, all of 1938, all of 1939, and the early part of 1940. Now, of course, this transaction, this case having started about early in 1940 no further claims have been filed. We have this as a test case. First I should say that the Department asked us to obtain, and we did obtain as soon as possible from as many men as possible, a written authorization from the various men involved to present their case and make refund. Those have been filed with the Internal Revenue Department, so we do not have those original instruments. After that was done, the Internal Revenue Department considered our claims, and granted the claim in part, but not in full, and made an actual refund to Mr. Silk of something like $350. We could not get the Internal Revenue Department to clarify the rulings because we did not know who they exempted and who they taxed. We do not know from their letters which will be offered here, so after some consideration the Internal Revenue Department reconsidered the matter, reassessed the tax against Mr. Silk. We then filed this case in order to get a total determination of the question. I am
22 not going into any more detail in my opening statement, because I don't believe it is absolutely necessary. I should like to say that Mr. King of the United States Attorney's office and I discussed this matter, and it is our desire, and in fact we are prepared to present the evidence in order to determine the question of law involved. We did not think it was necessary to burden the Court with the question of computing the tax. So it will require this and more. May I make this statement, Mr. King?

Mr. KING. Yes.

Mr. GLENN. That we proceed with the introduction of evidence in order for this Court to determine whether or not these people are independent contractors or self-employers or whether they are employees, and then reserve jurisdiction of the case if you will until the parties can make an attempt to compute the tax based upon your ruling. I think that will save time.

The COURT. Go ahead with your evidence.

Mr. GLENN. First perhaps I should offer a stipulation which the parties have entered into.

(An instrument handed to the reporter was marked for identification as "Plaintiff's Exhibit No. 1."

Mr. KING. Does the Court want to hear from us at this time?

The COURT. Briefly; yes.

Mr. KING. All right, if the Court please, Mr. Fisher of the Department is here and he will make the opening statement.

Mr. FISHER. If the Court please, the position of the Government is that the truckers and unloaders involved here are employees because there is a sufficient right of control, a sufficient practical control to place them under the Act, the Social Security Act. This Act is full of problems. It is a new law. It is in the process of clarification now. These rulings of the Department arise out of the fact that the law is not clear, has not been fully clarified, but we do urge here that there are sufficient elements of control or right of control, and actual control to place these people under the Act. At this state I should like to say that included in the plaintiff's complaint is a request for an injunction as to future laws.

23

Mr. GLENN. That is not being pressed.

Mr. FISHER. That is not being pressed. May we consider that out of the case then?

Mr. GLENN. I think so. We are simply trying to get a ruling of the Court as to the questions involved.

Mr. FISHER. I had some doubts.

Mr. GLENN. I think what Mr. King said here this morning that what we wanted the Court to consider is absolutely correct. However that does appear in the pleadings, although I do not think we need to go into it. We do think it appears there, and if the Court is going to retain jurisdiction to determine the amount of tax allowed, I think it might be reserved.

Mr. FISHER. Perhaps I need not say anything more except there have been some decisions, a decision by the Western District of Michigan.

The COURT. I will hear argument about the law after we get the evidence.

Mr. FISHER. I think that is all.

Mr. KING. I think that probably we should have a stipulation here in the record to the effect that the only parties involved here for the consideration of the Court are the truck drivers and the coal unloaders; that there is no question as to the bookkeeper, the yard foreman, and the watchman, so that we will stay right on the path that we set out; is that correct?

Mr. GLENN. That is correct. Mr. Silk had two or three men, if the Court please, who are admittedly employees but I thought my opening statement made it clear that the only question raised was as to the truckers and unloaders.

The COURT. You are just suing them to recover taxes paid on the wages or the alleged wages of the coal haulers and coal unloaders?

24

Mr. GLENN. That is correct.

The COURT. All right; go ahead.

ALBERT SILK, the plaintiff herein, called as a witness, in his own behalf, having first been duly sworn, was examined and testified as follows:

Direct examination by Mr. GLENN:

Q. State your name.
A. Albert Silk.
Q. Where do you live?
A. Topeka.
Q. What is your business?
A. Retail coal.
Q. How long have you been engaged in that business?
A. Twenty-six years or more.
Q. Where is your place of business located in the city of Topeka?
A. 605 and 607 East Fourth.
Q. Do you have any other business except the retail coal business?
A. None.
Q. You are the plaintiff in this case?
A. That is right.
Q. Mr. Silk, did you about the latter part of the year 1939 receive copies of rulings made by the Internal Revenue Department on the question of independent truckers from the Department or from some other agency?
A. I received copies of cases handed down by the Department to the Missouri Valley Coal Association of which association I was a member at the time.
Q. One of those cases was from Indiana?
A. Yes, sir: a case I believe in Goshen, Indiana, and similar to ours in every detail.
Q. Was there another case in Kansas City, Missouri, on a similar matter?
A. Yes, I believe the Kansas Coal——
The COURT. Just announced?
25 A. Yes.
Q. Following the receipt of those rulings, did you then make an application before the Kansas Unemployment Compensation Department for an exemption under the Act?
A. I have.
The COURT. Under the Federal Act, or State Act?
Mr. GLENN. State Act.
The WITNESS. I had.

By Mr. GLENN:

Q. As I understand it, just to clarify the record, you make no claim for exemption as far as your bookkeeper, office man, and your yard foreman is concerned; is that right?

A. That is right.

Q. Your claim only goes to truckers and unloaders?

A. That is right.

Q. Was there a hearing before the Kansas Unemployment Compensation Department?

A. Yes.

Q. Do you know the result of that hearing?

The COURT. That isn't the question. That is a question of the record. He can't testify to that.

Mr. GLENN. That is right. We have it here. Before that, or following that hearing before the Kansas Department, did you then make claim before the Federal Internal Revenue Department?

A. Yes.

Q. Do you know about when that was, Mr. Silk?

A. Yes; I think 1939 and 1940. I couldn't say exactly now.

Q. Early in 1940, wasn't it?

A. Somewhere around there.

Q. That is approximate. Was there a ruling on that claim or on those claims which you made?

A. Yes.

Q. Was some money refunded to you because of that claim?

A. Yes.

Q. Approximately how much?

26 A. Oh, $300. I can't say the exact amount, but it was over $300.

Q. Is it in the stipulation?

A. Yes.

Q. After there was a refund to you made on your claim, was that tax then reassessed against you?

A. It was.

Q. Did you repay it?

A. I had.

Q. Was there a tax warrant issued against you at the time you repaid it?

A. I think there was. I know we repaid the money.

Q. There is no dispute about that.

Mr. KING. As far as that goes I think it is immaterial. I don't think there is any dispute about it.

By Mr. GLENN:

Q. After you repaid that money, Mr. Silk, did you then file this action?

A. Yes.

Q. Now getting down to the facts involved in the case, and we are not concerned, Mr. Silk, with dollars and cents. We will go into that later; have you at any time during the years involved in this case owned any trucks of your own?

A. I have not.

Q. Do you own any trucks?

A. I do not.

Q. Do you have your coal delivered from the yard?

A. Yes.

Q. How is that delivery done; I mean by whom?

A. By coal haulers.

Q. So far as you know, who owns the trucks which they use?

A. They do themselves, as far as I know.

Q. Do you have any interest in those trucks yourself?

A. I have not.

Q. Who pays for the repairs on those trucks, as far as you know?

A. They pay them themselves.

Q. Do you pay for any repairs?

A. I do not.

27 Q. Who buys the gasoline and oil and tires for their trucks?

A. They do.

Q. As far as you know

A. These coal haulers do as far as I know.

Q. Do you furnish any tires or repairs or gas or oil of any kind?

A. I do not.

Q. Do you require them to buy their gas or oil at any particular place?

A. I do not.

Q. Or their tires at any particular place?

A. I do not.

Q. So far as you are concerned, Mr. Silk, are they permitted to purchase their gas and oil and tires and repairs any place they please?

A. That is right.

Q. Do you make any allowance of any kind to them for that expense?

A. I do not.

Q. How do you pay them for the services they perform for you?

A. So much a ton.

Q. Has that price varied some through the years?

A. It has.

Q. Have you ever paid them on any other basis than by the ton the years in question?

A. Not as I know of.

The COURT. You pay them so much per ton to have it delivered?

Mr. GLENN. In order to make that clear to the Court——

The COURT. Does the distance they have to go make any difference?

Mr. SILK. In some cases.

The COURT. Just answer yes or no.

A. Yes.

The COURT. All right, that is all.

28 By Mr. GLENN:

Q. Does it make a difference as to whether the coal is wheeled in or carried in, or shoveled off?

A. You mean pay?

Q. Yes.

A. Yes.

Q. What is the rate for just straight trucking, that is the rate you were paying back in 1937, 1938, and 1939?

A. Along in there, if I remember, it was 50 cents and 75 cents for domestic hauling, and for steam hauling, approximately those figures.

Q. Then later on it was increased ten cents a ton; is that correct?

A. That is right.

Q. If those men needed any helper on their truck, who furnished the helper?

A. They furnished the helper.

Q. Did you furnish a helper to help them unload the coal at the point of destination?

A. At first we did.

Q. I mean during the years in question, 1937, 1938, and 1939?

A. I know we used to. Then we gave them an increase in pay, so they will have their own helpers.

Q. During the years in question here, did you furnish them helpers?

A. If the place was bad, we did give them a helper.

Q. Was that plan later changed?

A. That plan was later changed.

Q. What was it later, and what is it now?

A. We increased their pay at that time ten cents a ton, so they could hire their own helpers if they want them.

Q. Who determines whether or not they need a helper?

A. They do.

Q. Do you have any choice over this helper they select?

A. I do not.

Q. Do you have any determination of the fact as to whether they should have a helper?

A. I do not.

Q. Is there any equipment used on these trucks to handle the coal such as shovels and forks?

A. Shovels and forks.

Q. Do you own that equipment?

A. I do not.

Q. Who owns it, as far as you know?

A. These haulers do.

Q. Do the haulers furnish all their own equipment for the loading and unloading of coal?

A. As far as I know I do.

The Court. How did they originally buy their trucks?

A. Your Honor, I don't know.

The Court. Did you finance them?

A. No; I did not.

The Court. Guarantee their note as payment of the purchase of the truck?

A. I did not.

The Court. Any finance company?

A. No.

The Court. How did you originally get hold of them? Did they just come in and ask for jobs?

A. That is right.

The Court. Stated they had their own truck and wanted to do some hauling?

A. Yes, sir.

By Mr. Glenn:

Q. You at one time used the Yellow Cab Company and the Transfer Company for hauling, did you not?

A. Years back we have.

Q. Before you used a different method of hauling?

A. Well, we have used both, anything we could pick up when business is rushing.

Q. That would be the Topeka Transfer Company?

A. The Merchant's Transfer Company.

Q. And the Yellow Cab Company?

Q. And the Yellow Cab Company.

Q. When they had a delivery of coal to make, who determined the route or the street over which they would travel to make that delivery?

A. They did themselves.

Q. Did you direct in any way the route they had to travel to reach their destination?

A. I did not.

Q. Or the route they would travel in coming back to the yard?

A. I did not.

Q. Will you please describe to the Court, Mr. Silk, the arrangement of your office building, your present office building, and the one you previously used, so that the physical set-up will be in the record.

A. Well, we have an office, scales, a place where they drive, the haulers. They have made a board themselves as to who takes the next load.

Q. I mean, Mr. Silk, just the arrangement of the building.

A. We have an office and a scale and a place for them to stay in.

Q. There are two office buildings, are there not?

A. That is right?

Q. With a driveway between them where the scale is located?

A. That is right.

Q. Is this building to the west the building which the truckers use for a waiting room?

A. At the present time.

Q. At the present time. It was formerly your office, was it not?

A. Up until six years ago.

Q. And then you built the building on the east which is your present office building.

A. That is right.

Q. Is there any time fixed by you at which these men must report for duty?

A. No, sir.

Q. Do you have any written contract of any kind with them?

A. I have not.

Q. Have you had during the years in question?

A. I have not.

Q. Tell the Court whether they can come and go at will or whether you fix the time at which they come and go.

31 A. They can come and go as they will and leave when thy want to. They can take an order if they want to, and they don't have to take it if they don't want to. It is up to them.

Q. As a matter of fact, does the time at which these men report in the morning and I mean by report the time at which they come to your place of business, does that vary with the men?

A. It does.

Q. Do some of them come early and some of them come late?

A. That is right.

The COURT. Do they take their trucks away every night when they go home?

A. That is right.

By Mr. GLENN:

Q. Do you have any right and do you exercise any right to tell them to report at a certain time?

Mr. KING. We object, if the Court please, as calling for a conclusion of the witness. Let him tell what they do. I think that is a question for the Court.

The COURT. Sustained; it is calling for a conclusion.

By Mr. GLENN:

Q. Have you at any time, Mr. Silk, told them to report at a certain hour? I believe you have answered that.

A. Yes.

Q. You said they came and went as they please. That is repetition. When an order comes into your yard, how is it determined as to who makes the delivery?

A. They determine that among themselves. They made up a board with their names on it, and they start out, the first man out was the last man, or went to the bottom of their list they made up, and each man took his turn as he rang for a truck.

Mr. GLENN. Do you attempt to determine now the order in which they go out on deliveries?

A. I do not.

Q. Mr. Silk, if an order comes in for delivery, do you
32 ask a man to make it, and does he have the right to refuse it?

A. Not only does have the right, but they exercise it quite often.

Q. Is it a common occurrence down in your business for the next driver up on the list to decline the delivery you have to be made?

A. They have done it.

Q. Has that been a common occurrence?

A. Yes, sir.

Q. Do they haul for other people during the period they are hauling for you?

A. They do. They can.

Q. Tell the Court whether or not they actually haul for other coal dealers as well as for other parties?

A. Some of them have done it.

Q. What other things have they hauled as far as you know during the coal season of the year?

A. They can haul anything they want. They have hauled grain, they have hauled hay, household furniture, or anything they want to.

Q. Do calls come into your office from other people for truckers to come over and haul for those other people?

A. We have had them.

Q. And when these calls come in, you give the message to the man who hauled?

A. I tell him if they want to.

Q. You tell them if they want to what?

A. I tell them there is a call from another yard. If they want to go to haul they do, or they don't. I just deliver the message to them some other yards need help.

Q. Does that apply also for calls that come in for trucking other than coal?

A. That is right.

Q. As a matter of actual fact, Mr. Silk, I will withdraw that. If a man makes a delivery for you, is he required then to report back to the yard?

A. He does not have to.

Q. And in many cases do they not report to the yard?

A. In many cases they make a delivery and go on wherever they want to.

Q. Are they required in any way to come back to the yard or report in to you over the phone or anything of that sort?

A. No, sir.

The COURT. Do they have to carry your name on their truck?

A. They do not, your Honor.

Q. Any name on the truck at all?

A. Years back, long before this case was in question even it was the custom of the yards.

The COURT. I am just asking you?

A. Not now.

The COURT. Was your name on any of their trucks?

A. Years back.

The COURT. Is it today?

A. No, sir.

The COURT. During this time involved in this lawsuit?

A. I believe there was one truck that had a sign.

The COURT. Is that all?

A. As far as I can remember; yes.

The COURT. Have that sign on now?

A. I never paid no attention. It is not compulsory.

The COURT. Do you have any advertising matter on the truck at all?

A. No, sir.

Mr. GLENN. Your telephone number and your address is not on the truck, as far as you know?

A. They haven't it.

Q. You don't require anything of that sort?

A. No, sir; I do not.

Q. As a matter of fact the man who did have the one sign on his truck was one of the old haulers who had been hauling for a number of years?

The COURT. Your questions are very leading.

Mr. GLENN. I know they are.

A. May I answer?

(Last question read by the reporter.)

A. That is right.

By Mr. GLENN:

Q. The truckers now go back and forth past your window as they weigh in and out, do they?

Mr. KING. I am going to have to object to the leading question there.

Mr. GLENN. That is just a preliminary question. I will put it this way. Do you see the trucks as they go by into your yard now?

A. As they weigh in?

Q. Yes.

A. I do now, because I do the weighing.

Q. Have you had any truck that was hauling for you with your name on them in the past few years: two or three years?

A. Years back?

Q. No, in the past few years, during the time this case has been pending.

A. I will answer that one truck as I stated before I told you.

(An instrument handed to the reporter was marked for identification as "Plaintiff's Exhibit No. 2.")

By Mr. GLENN:

Q. I now hand you plaintiff's Exhibit 2, and ask you to state what it is.

A. It is a copy of our record ledger.

Q. Under what heading do you list the cost, or the amount, the rate that you pay the truckers about whom you have just testified?

A. Under hauling.

Mr. GLENN. We offer in evidence Plaintiff's Exhibit 2.

The COURT. Any objection?

Mr. KING. No objection.

By Mr. GLENN:

Q. Mr. Silk, going back to a point I was questioning you on just a moment back, are there actually or have there been cases where the men have not returned to your yard after they have made deliveries?

The COURT. He said there were some cases. He has already testified.

Mr. GLENN. I though I had covered that. Mr. Silk, are there days that some of the truckers do not come to your place at all for hauling?

A. That is right.

Q. That is frequent occurrence or common occurrence?

A. A frequent occurrence; yes.

Q. Do they speak to you in advance and make arrangements for that time off?

A. They do not.

Q. Is one of the men who has hauled for you, Mr. E. M. Thompson?

A. Yes.

Q. Do you recall an incident in 1939 when he did not come down to do hauling for you?

A. I do.

Q. Will you tell the Court what that incident was, please?

A. He took a job working in the city auditorium, and he never showed up and never told anybody about it. We did not know until days after that he was working there.

Q. Did his truck continue to come down to your place of business for hauling during that time?

A. It did.

Q. Who was driving the truck, do you know?

A. Someone he got, someone he hired.

Q. Did you have anything to do with the selection of the new driver with Mr. Thompson's truck?

A. I did not.

Q. Did he make any arrangements in advance with you about it?

A. He did not.

Q. Do you recall an incident at about the same time or during the time in question here when some of the men went to Liberal, Kansas.

36 A. That was later, after that.

Q. Tell the Court about that.

A. Either three or four of the drivers went and was gone almost a week. Three or four days, maybe a week, didn't even know where they went till they came back to hauling again.

Q. Did they report in to you that they were leaving?

A. No, sir.

Q. Do you have a trucker by the name of Carl Wodl?

A. Yes.

Q. Is he the man who went to a farm to work?

A. That is right.

Q. Tell the Court about that transaction.

A. There isn't much to tell. He sold his truck and went to work on a farm.

Q. Did you know anything about it at the time or in advance?

A. No, I did not.

Q. Any arrangements made with you in advance about it?

A. No, sir.

Q. Did you know anything until after it had all occurred?

A. Until after it had happened. I heard rumors.

Q. Are there any kind of instructions, written instructions given out to your drivers?

A. None. You mean the truck drivers, instructions?

Q. No, I mean written instruction as to how they are to do?

A. No, sir.

Q. As far as you know who purchases and pays for the license tags used on these trucks?

A. They do.

Q. Do you pay any part of the cost of the license?

A. No sir; I do not.

Q. By that I mean the state license, the tag. Now one other thing I want to go into, Mr. Silk, is the question of chutes; and I have reference to the chutes used in unloading. Do you have chutes in the yard?

A. I do.

Q. For unloading coal?

A That is right.

37 The COURT. He said he furnished no equipment.

Mr. GLENN. I'm leading up to another point, Judge, that I want to develop there. There are times when customers request chutes to be used in unloading the coal from the trucks into the house?

A. They do.

The COURT. You furnish those, do you?

A. May I explain that, Your Honor. There are different distances from the truck to the house, in the unloading. We have a number of chutes that they use in the yard.

The COURT. You send them out?

A. If they want them. We tell them to take the chute with them.

By Mr. GLENN:

Q. Do drivers then have the right to decide whether or not they want to use a chute in unloading?

A. That is right.

Mr. KING. I object to that question, how this man knows if the drivers have the right.

Mr. GLENN. I will ask him that. Do you request them to use chutes when requests come to you for them to use chutes?

A. I tell them about it.

The COURT. They take your chutes. The chutes belong to you?

A. The chutes belong to us, yes.

By Mr. GLENN:

Q. Do drivers either agree to use them or refuse to use them?

A. They have refused on many occasions a chute. Either it was too hard, or too long to get in. There isn't over one per cent of the places where they have to use a chute.

Q. You mean one per cent of the deliveries?

A. Of all the deliveries.

Q. And on that one per cent, when such requests come in, do the drivers always take chutes even though you tell them the customers request them?

38 A. No, sir.

The COURT. He said no, they don't.

By Mr. GLENN:

Q. Do you make any attempt to tell them to use the chute if the customer has requested it and the driver objects?

A. I tell them.

Q. You tell them the customer wants it?

A. That the customer wanted to use a chute. It would be easier for their place.

Q. That isn't my question, Mr. Silk.

Mr. KING. We object to the question because it is leading.

Mr. GLENN. I asked him if he made any attempt to tell them to use a chute if the customer wants it.

A. I don't make them use a chute if they don't want to. I tell them. That is all. It would be easier for them to unload.

Q. In the case where requests are made for chutes, do they always take them when a request comes in?

A. No, sir; they have refused to take the order to make a delivery. They take along a chute where it is a hard place.

Q. Mr. Silk, if the men are at your yard between deliveries, do you require them to do any work for you around the yard while they are waiting for another delivery?

A. I do not.

Q. What do they do while they are waiting for another delivery?

A. Some of them read mystery stories, they play cards, and some of them just sit around and talk. There is plenty of reading if they want to use it.

Q. Is there anything required of them so far as you are concerned during the time they are at your yard waiting for another delivery?

A. None whatever.

The COURT. How many men are generally on tap there awaiting orders?

A. That varies, Your Honor. At the present time we have, I believe, eight.

39 The COURT. How many?

A. Eight. We used to have as much as fifteen.

The COURT: Sitting around there waiting?

A. That is right.

By Mr. GLENN:

Q. That many waiting, or that many truckers who worked?

A. They may, although they are waiting around. Some of them actually go out.

Q. You have eight on the list?

A. Yes.

The COURT. He has answered the question. He said there were eight generally around there.

Mr. GLENN. All right.

The COURT. You furnish them a place to wait?

A. Yes, sir.

The COURT. Do you give them lockers or anything like that?

A. No.

The COURT. Rest room service?

A. There is a rest room.

The COURT. I think you have your story pretty well complete.

Mr. GLENN. I was checking on some notes to see if I have it all covered. Mr. Silk, as far as you are concerned, are the men required to belong to any organization of any kind?

A. Not in the least.

The COURT. Do they have a union?

A. Of their own?

The COURT. Yes.

A. No, sir.

By Mr. GLENN:

Q. Do you know whether or not these men have chauffeur's licenses under the Kansas Driver's Law?

40 A. They do not.

Q. Do you make any attempt to obtain such licenses for them?

A. No, sir; I do not.

The COURT. Do they pay a license tax on their trucks?

A. Yes, Your Honor.

The COURT. Do they pay that?

A. I suppose so. I couldn't say.

The COURT. Do you pay any of the tax either directly or indirectly?

A. No, sir; I do not.

Cross-examination by Mr. KING:

Q. Mr. Silk, I believe you say you have been in business about twenty-six years in Topeka in the coal business?

A. That is right.

Q. Have you always operated about the same way you now operate, that is with hauling the coal by truckers?

A. Since 1922.

Q. Since 1922?

A. Yes, sir.

Q. When you started this did you run an ad in the paper that you wanted drivers?

A. We do that on occasion. We have had ads like in years ago, truckers wanted and coal haulers.

Q. At the time you first started in on this relationship?

A. Back in 1922?

Q. Yes, then.

Mr. GLENN. I object as incompetent, irrelevant and immaterial. That is fourteen years before the time involved in this case.

By Mr. KING:

Q. All right, do you operate the same now as you did when you started in 1922?

A. As far as I know, we do.

Q. When the truckers first came in what was said when the truckers first came in to your place? How did they know you wanted them, had coal to haul?

41 A. Well, to give you a better picture or better describe my set-up so you will know. In 1922 I went into business for myself. Before that time I was with another concern, and when I left a number of haulers that worked at the other place came to work for me at that time. They came to work for us, and as the business increased they would recommend their friends or tell other haulers to come and haul for us, and that is about how it grew up that way.

Q. And sometimes you ran ads for haulers?

A. We ran an ad as far as I can remember once.

Q. For instance when a trucker came in to you, and these men who were truckers came in to you, what was said when they first came and asked you if they could go to work?

A. What was said?

Q. Yes, what sort of arrangements did you make with them?

A. We paid so much a ton, and if you want to haul you can haul. That is all there is, and we don't hire anyone to haul coal unless we know something about them. As I said, most of these men were recommended by the haulers who were hauling.

Q. Do you tell them of any of the things that you want done? For instance, in making a delivery, whether they should go to the front door or what they should do when they go out to make deliveries?

A. No, sir; we don't tell them anything.

Q. Leave that entirely to them?

A. To them, that is right.

Q. Don't tell them not to go to the front door?

A. No, sir.

Q. What about making collections?

A. If it is a C. O. D. order, we tell them.

Q. Do they make C. O. D. collections?

A. If they are to, they are stamped.

Q. Mr. Silk, as I understand now, you have one office there on your property, is that true? You have an office on your property?

A. That is right.

Q. Then there is a scale next to that office?

A. That is right.

42 Q. Then there is a separate building there where these truckers stay?

A. That is right.

Q. Between the orders; is that correct?

A. Yes, sir.

Q. Is there some sort of a bell arrangement between your office and their office?

A. Yes, sir.

Q. What is the purpose of that?

A. To ring for the next man.

Q. Who installed it; did you have it installed?

A. I believe we did.

Q. How long has it been there?

A. I couldn't tell you.

Q. You did have it installed there?

A. That is right.

Q. In other words, if I understand correctly that someone orders coal, and they call you on the phone; is that the general way?

A. Yes.

Q. And you take their order and ring the bell which rings in the truckers place?

A. Yes, sir.

Q. Where they stay, and then one of the truckers come into your office?

A. That is right.

Q. You are pretty busy in the office, are you, Mr. Silk?

A. Yes.

Q. As a general rule?

A. Yes.

Q. Is that the reason why, Mr. Silk, you let the truckers determine who was next up, because you thought that was something you could get rid of, or what is the reason for letting them determine who was the next one?

A. I believe that was the suggestion of making the equitable way, of getting their turn.

Q. So you let them do it because you did not want to be bothered?

A. That is right.

Q. Told them they could make all their arrangements among themselves?

43 A. That is right.

Q. When the trucker who is next up comes into your building, he walks in and receives some sort of instructions, or you tell him what to do; is that right?

A. We tell him what to get, how many tons.

Q. Do you give him anything in writing?

A. No, sir.

Q. Don't you give him a ticket?

A. To make a delivery.

Q. In other words, when an order comes in, do you make an original and a copy of an order on a ticket?

A. That is right.

Q. One of those tickets goes to the trucker; is that right?

A. That is right.

Q. On the tickets you always state the type of coal which is to be hauled?

A. I do.

Q. You write that on the ticket?

A. That is right.

Q. And the amount?

A. That is right.

Q. What about the time that the coal is to be delivered? Do you write when it is to be delivered?

A. Only in cases for the convenience of the customer.

Q. In other words, where the customer wants it a certain time, you write it down there then?

A. Yes, otherwise it is left open.

Q. Isn't it also true, Mr. Silk, that you write on those the size of the chute that the trucker is to carry with them?

A. That is for their own information.

Q. All right, but you write that on the ticket, the kind and size of chute the trucker is to take with him?

A. It is already there. When a customer calls for his order and he says take a chute, we will ask him what length, what size of chute. He will say eight, ten, twelve, sixteen feet, whatever

it takes, and when the order is written up, that information is put on the ticket for the driver to take.

Q. In the same way, do you write on the ticket, do you write whether his coal is to be sprayed down before delivery?

A. Yes, sir.

44 Q. Do you write down on the ticket if the coal is to be stacked at the place of delivery?

A. That is right.

Q. Do you write down on the ticket if the coal is to be screened before putting in the truck for delivery?

A. All coal is screened except steam coal.

Q. But does any of that go on the ticket?

A. It may, but I couldn't say for sure, but all domestic coal is screened.

Q. Is there anything else that goes on those tickets, so we will have a complete understanding?

A. I couldn't say what else would go on. It is a printed form.

Q. The amount of charge, of course?

A. That is right.

Q. And whether they are or whether they are not to make collection?

A. If the order is a charge account, it is marked "okay."

Q. Mr. Silk, what of the people you deliver coal to; are they always good pay?

A. It does not make any difference in this case, please.

Mr. GLENN. I object as incompetent, irrelevant, and immaterial.

The COURT. What is the question?

(Last question read by the reporter as follows:)

Mr. GLENN. Whether his customers are good pay. I don't think that is material.

Mr. KING. What I want to go to is to ask is the trucker ever responsible for failure to pay a bill?

A. The delivery man has never paid a coal bill yet.

The COURT. Do you expect them to?

A. Never tried to, your Honor.

The COURT. You never ask them to?

A. No.

The COURT. All right.

45 Mr. KING. One more question if I may on that. Have you at times though instructed the truck drivers not to deliver the coal until it was collected for first?

A. That is right.

Q. Do the truckers weigh in when they first come in the morning, Mr. Silk?

A. They do.

Q. Was that at your suggestion or direction?

A. There is no suggestion. They have to give people honest weight and give them what they sell them.

The COURT. Is there a city ordinance?

A. Yes, your Honor.

The COURT. Providing you weigh coal. What is that?

A. The trucks should be weighed at least once a day, but we weigh them at least twice a day. In stormy weather, we weigh every load.

The COURT. When do you put water on the coal?

A. That is done after it is weighed.

By Mr. KING:

Q. Mr. Silk, in other words you do furnish the ticket?

A. Yes.

Q. You furnish the coal chutes?

A. That is right, to the extent that I stated before, about one percent.

Q. About how many of them do you have?

A. Oh, I couldn't tell you.

Q. Twelve.

A. Maybe twelve, and maybe more. Different sizes. They break up so many of them in the yard.

The COURT. How many trucks do you send out a day?

A. Oh, Your Honor, it has been varied from perhaps days we have made as high as, delivered as high as 250 tons a day there.

The COURT. How many times does the trucks go out?

A. One individual trucker?

The COURT. No, I mean altogether.

46 A. All together, we perhaps send from fifty to one hundred loads a day.

The COURT. You send out fifty to one hundred of these truckers a day?

A. That is loads.

The COURT. What part of the year is that; how often does that take place?

A. The last 2 years have been practically the whole year round, Your Honor, but before the emergency it was only about six or seven months in the year.

The COURT. In other words, you call out fifty to one hundred trucks a day?

A. No, no. Perhaps I didn't make myself clear.

The COURT. How many times do the truckers go out from your place?

A. Each trucker?

The COURT. No, all together.

A. All together, they make from fifty to one hundred deliveries a day.

The Court. All right.

By Mr. King:

Q. Mr. Silk, they have to use wheelbarrows at the place of delivery, do they not?

A. Yes, sir.

Q. What about the planks, do you furnish the planks for them to use for their running the wheelbarrows on?

A. The planks are always there in the yard. We use them for the coal bins, and the drivers cannot carry planks with *ever* load. There would be a lumber yard.

Q. Do you furnish wheelbarrows and the planks?

A. The wheelbarrows are theirs, your Honor. They own the wheelbarrows.

By Mr. King:

Q. Mr. Silk, in about 1936, you had about twelve signs made with Silk Coal Company on them; is that true?

A. I don't recall it.

Q. You don't know the year you had those made?

47 The Court. Had what made?

Mr. King. I think we can bring this out. Mr. Silk had new signs made with Silk Coal Company on them for the purpose of having the truckers use them on their trucks.

A. That was years bac .

Q. Were those signs n ade in the year 1946?

A. I couldn't tell you.

Q. How many signs did you have made?

A. I don't know; don't recall.

The Court. He said there wasn't any.

Mr. King. Well, I can bring it out with another witness, I think. You also furnish the screens where they screen the coal?

A. They are ours.

Q. And the picks?

A. The ones in the yard are ours. Some of them have their own.

Q. Truck drivers don't use those very often though?

A. No.

Q. I see. Awhile ago you said that you did not require them to report at any particular time any particular day?

A. That is right.

Q. How were you ever sure that you would have any truck drivers on hand?

A. I am not sure.

Q. You are not sure.
A. No, sir.
Q. Have you ever been in the situation where you did not have them on hand?
A. I am embarrassed every day.
Q. You are?
A. Yes, sir.
Q. In other words, there has been a morning when no truck drivers ever showed up?
A. There is always someone shows up.
Q. You never know who it is going to be?
A. No, sir; I do not.
The COURT. What do you do if you come down to the office and have a lot of orders to get out?
48 A. I will cite you a case.
The COURT. No; just answer the question. Do you wait until they come in?
A. Yes, sir.

By Mr. KING:

Q. As a general rule, Mr. Silk, you have about six or eight truck drivers who show up there about seven o'clock every morning between September and April of the year; is that true?
A. No; it is not true. And as to the time, there is no time set, but they know this. When it is light they can see to load and start loading as soon as they start coming in, but at 6:30 or a quarter till seven or quarter to eight, it depends on the time of the year, there is no set time as to when they want to come. They come in at all hours.
Q. Have you ever had any complaints of any customers, Mr. Silk, as to the way that some of the coal was delivered?
A. Yes, sir.
Q. What were their complaints; what did they mainly consist of?
A. They didn't do a good job, and they didn't clean up.
Q. Ran off, got over in the yard?
A. That is right.
Q. Broke down the clothesline?
A. Might have been.
Q. Ever have any complaints of that kind?
A. I think some.
Q. Backing into the garage or the building?
A. It might be.
Q. What did you do, as far as telling the truck driver about it?

A. Well, we just tell them people called in and made a complaint. That is all we can do.

Q. Do you tell them to be careful?

A. That is a natural way of doing business.

By the COURT:

Q. You wanted to know whether he fired them or not, or whether he sent them back out there, what his disposition of them is?

By Mr. KING:

Q. Do you ever send them back out to clean up?

49 A. Well, I don't recall of any cases ever we have had, but if it has to be cleaned up we will send someone from the yard to clean up. We may have sent some of them to clean up.

Q. If they damage anything, who pays for the damages?

A. We pay for it.

Q. You pay for it?

A. Yes.

Q. You bill it, charge it, against the man?

A. No, sir; we do not.

Q. When a man who is hauling coal needs a helper, does he come to you and ask if he can hire a helper?

A. No, sir; he did not ask me anything.

Q. He did not ask you anything?

A. If they got a bad place, and they needed help to get the coal in, we would have them call the office, and they had a helper of their own and they could do it.

Q. Have you ever fired anyone, Mr. Silk?

A. As far as I can recall, I can't recall any just now. What do you think, a good man should be fired?

Q. Why?

A. Why?

Mr. GLENN. To which we object. It never happened, and it never has, and it hasn't any bearing.

The COURT. It never happened anyway.

By Mr. KING:

Q. Mr. Silk; isn't it true that at any time that the men were working and wanted to leave for any reason, that they usually came to your office and asked you for permission to go; isn't that true?

A. They did not.

Q. They did not?

A. No, sir.

Q. Mr. Silk, you carry insurance on these trucks?

A. They do now.

Q. Is it or isn't it true that when these truckers came in that you would say to them that they must carry insurance before they could haul for you? Answer if it is or is not true.

A. Yes.

Q. It is true?

A. Yes.

50 Q. All right, just a minute. Just answer the question, please. Now you told them they could not haul for you until they had insurance on their trucks?

A. That is right.

Q. Now, is it not true that you see that the premiums are paid and deducted, those premiums are deducted from their pay on most of the men who work for you?

A. I know that is not true. Here is the case to make it easier on them.

The COURT. Just answer the questions.

By Mr. KING:

Q. To make it easier on them?

A. Instead of them paying out one lump sum which most of them could not do, we have been paying the premium, and it is deducted five cents a ton from the premium that has been paid, and if there is anything above that it is refunded back to them.

Q. Do you usually pay your drivers once a week?

A. We usually pay our drivers once a week, but they can draw every time they want to, every load every day. It is up to them.

The COURT. How about their license? Do you pay that?

A. No, sir; I do not, your Honor.

The COURT. I mean do you deduct it?

A. No, sir; they pay themselves. I have nothing to do with that.

The COURT. How many licenses do they have to have, a city and state?

A. City and state; a driver's license. I don't know. I have no power.

By Mr. KING:

Q. Mr. Silk, awhile ago you said you were the one—that the truck drivers are the ones that set the route they could take, and that they are the ones that designate them. Have you ever gone on any trucks with them to unload coal?

A. Yes, sir.

Q. How do you know they are the ones that choose their own route?

51 A. I don't know.

Q. Mr. Silk, you testified awhile ago that some of these truckers have refused at various times to make or to take a load of coal when handed a ticket; is that true?

A. I believe the drivers will testify to that themselves. When they come in, we tell them what they are to get and what they are to load, and they have refused to take it.

A. All right, who have refused?

A. Who?

Q. Yes.

A. A good many of them. You want the names?

Q. Yes, I want the names.

A. Kirby has refused, and Dave Chesler has refused.

Q. Is he here today?

A. Yes, Chesler. Ernest Thompson has refused, and I believe Joe Heberling has refused. In fact, most every one of them has refused to make a delivery that they didn't care to go.

Q. Anyone else besides those four names?

A. Well, maybe more.

The COURT. Did they give any reason?

A. Many times they don't like the customer. They don't like the place to go to. They don't like the method to go to the place, for reasons of their own, your Honor.

By Mr. KING:

Q. Mr. Silk, awhile ago you said these truckers also haul for other coal dealers in town?

A. That is right.

Q. Have you ever seen them hauling?

A. I have seen it.

Q. You have seen it?

The COURT. Any of them that hang around other yards other than yours?

A. I couldn't tell you. I don't know.

The COURT. Are they away from your yard a sufficient time in order that they could be hauling for others?

A. Yes, your Honor.

By Mr. KING:

Q. Is the busy season of your business from April to September, or September to April?

52 A. Up until two years ago it was.

Q. Up to two years ago. The years involved here it was, from 1936 to 1939?

A. Yes.

The COURT. Inclusive?

Mr. KING. Inclusive, maybe September for one quarter.

Mr. GLENN. I think it is a part of 1936 and runs on up to the early part of 1940.

Mr. KING. I think that is right. During this period of from September to April, Mr. Silk, isn't it true that your haulers were usually only hauling for you and not for any other coal company?

A. Well, they hauled most of them for us, and they didn't haul for others, because we pay more, because our scale is higher than any yard in town. I think that will answer the question. Our scale has been the highest in town for years, and naturally it is to their benefit to be there. It is to their profit.

Q. In other words, they usually stick to you from September to April?

A. To their benefit.

Q. You know as a matter of fact, Mr. Silk, if their employment with you between September and April of the years involved here, 1936 to 1940, that was their main source of income?

Mr. GLENN. To which I object. He says their employment with him. That is the question involved.

Mr. KING. All right, their relationship.

The COURT. If any trucker applies to you to haul, do you refuse to let him haul?

A. No sir; I haven't.

The COURT. You take on any men, any man who comes along with a truck?

A. If he looks good to me.

The COURT. Have you ever refused anybody the right to haul your coal?

53 A. We have not hired some where we could hire.

The COURT. For what reason do you turn them down?

A. For different reasons. We pay our men more than the rest.

The COURT. Suppose a man, take the case of a man you refused to let haul. What do you tell him?

A. We have enough haulers.

The COURT. You had enough. That is all.

By Mr. KING:

Q. You said awhile ago, Mr. Silk, it was not necessary for the men to report back to the yard after they had made deliveries?

A. That still holds good.

Q. If they make a C. O. D. collection, were they not required to report back to the yard and return the money?

A. No, sir.

Q. They were not?

A. No, sir.

Q. How were you ever assured you were going to get the money?

A. We have all lost on one hauler.

Q. Isn't it true, Mr. Silk, if they didn't come back the same day, they would be there the next morning or there in the next day or two ready to haul?

A. Well, if they are going to haul, they will surely show up. After all, they are a bunch of honest men.

Q. How do you know your chutes, I mean the chute hauls only comprise about one percent of your total amount? Have you ever figured out?

A. No, but I could figure. That is by their own statement.

Mr. KINA. All right. I believe that is all.

Redirect examination by Mr. GLENN:

Q. Mr. Silk, I want to go into a little more questioning about the unloaders. I don't believe I went into that. How do you have your coal unloaded from the freight cars into your yard?

A. The car is set in the yard and it is unloaded either at the bank or on the ground.

Q. Who sets the car?

A. The Missouri Pacific.

Q. The railroad company?

A. That is right.

Q. Then on what basis is that coal unloaded?

A. We pay them by the ton.

Q. What is that?

A. We pay them by the ton, but there have been cases where there was a bad car, or a hard car to unload and they didn't want to unload by the ton because they couldn't make anything they have said we will unload it by the hour in order to get it off, which will make them the most money, but ordinarily it is paid by the ton.

Q. In the usual case how is it paid?

A. By the ton.

Q. Are there any hours fixed by you when that work it to be done?

A. There is not.

Q. What tools do they need to unload a car of coal from the car into your yard?

A. They have to have a shovel, and if it is a certain kind of coal they have to use a chute to get it out of the car and unload it.

The COURT. They unload it by the hour, a difficult car?

A. If it is a difficult car to unload, otherwise by the ton.

Q. That is on there—by their own request. I believe I asked you which way it was usually done in most cases?

A. Most other cases is by the ton.

Q. Who owns the shovels or forks that they use in unloading?
A. The fellow who unloads; they use their own shovels.
Q. You don't furnish them?
A. No, we furnish them chutes. Those are ours.
Q. Do they need a pick to unload or axes?
A. Well hardly, unless the lumps are too big, can't handle them.
Q. What instructions do you give them about the unloading of the coal?
55 A. Haul the coal, and unload it at a certain place.
The COURT. How many different kinds of coal do you have?
A. Twenty-one.
Q. Just to give the Court some idea of the way it is done. How much time does it usually take to unload a car of coal?
A. A good man can unload a forty-ton car in a day.
Q. Do you tell him when to begin work?
A. No, I do not.
Q. Do you tell him when to quit work?
A. I do not.
Q. Do you tell him when to go to lunch?
A. I do not.
Q. Are there any instructions which you give these men except to unload the car and where to throw it?
A. Not to break the coal more than they can help it.
Q. Now, how do you obtain men for this kind of work, Mr. Silk?
A. They come and go.
Q. Your men, they just drop in at the yard?
A. That is right; there is always plenty.
The COURT. A group of them there like the truckers?
A. Not exactly that scale; no.
Q. Are a good many of them floaters?
A. A lot of them are floaters, and some of them have unloaded for different yards.
Q. The same men who unload for you then unload at other yards around town?
A. That is right.
Q. How do you get them from the other yards if you need them?
A. They just come down looking for work, and ask if we have any car to unload.
Q. How many days time are you allowed to unload a car, before demurrage starts on it?
A. Forty-eight hours.
The COURT. You know in advance when a car of coal is coming in.

56 A. We have a shipping notice and they notify us when the car gets in town.

Q. How much notice have you when it is spotted at your yard?

A. It is unloaded forty-eight hours.

The COURT. They give you forty-eight hours notice before it is switched in your yard?

A. We have forty-eight hours to unload it.

The COURT. I mean what time, when a car comes in when you first know the coal is there to be unloaded, when it is spotted in your yard or before?

A. If my yard is in shape they can set it. It starts from the time it is set.

The COURT. When does the car actually come down?

A. Well, if I may explain.

The COURT. Go ahead.

A. (Continuing.) The car comes and our yard is full, the time starts from eight o'clock in the morning when it should have been spotted. If it is, we have forty-eight hours from that time. If the car comes in and they couldn't start in the yard, the forty-eight started from the time they called.

Q. Then during the car when your track is empty?

A. That is right. That is the instructions.

Mr. GLENN. I believe that is all.

Re-cross-examination by Mr. KING:

Q. Mr. Silk, did you have a bookkeeper there by the name of Mr. Taylor that used to be with you during the years between 1936 and 1940?

A. That is right.

Q. Then do you have a yard foreman?

A. That is right.

Q. Who was your yard foreman during 1936, 1937, 1938, and 1939?

57 A. I can't tell you the years, but it was Mr. Carl Vitto. He was the yard foreman.

Mr. GLENN. There is no question about him, about the yard foreman.

Mr. KING. No; I am not introducing it——

Mr. GLENN. (interrupting). We admit the office man and the yard foreman were regular employees on a salary.

By Mr. KING:

Q. Do you have anyone else regularly employed and working out in the yard?

A. A watchman. We have a night watchman.

Q. A night watchman?

The COURT. These men, do they ever leave their trucks there over night; the truckers?

A. As far as I know they do not.

The COURT. Do you allow them to leave their trucks there?

A. If they wanted to, they could. It is not open.

Q. Now, do you always have some employees that you call yard men, who work under your yard foreman?

A. Yard men, what do you mean? He is in the yard?

Q. Yes.

A. Well, if there is work to be done, it could be called as such.

Q. Well, do you have regular people to do that type of work?

A. Not necessarily.

Q. Who work in the yard?

A. Not necessarily.

Q. How many employees do you have besides Mr. Taylor and Mr. Vitto and these truckers and these unloaders? Do you employ anyone else than them for any purpose?

A. No; except the night watchman, which we admit is a regular employee.

The COURT. You have no other employees than them for any purpose?

A. No.

58 By Mr. KING:

Q. What are the duties of your yard foreman?

A. To see that everything is kept in shape, the coal is unloaded; that the orders were gotten out, didn't run over piles of coal.

Q. Some of these men who were unloaders worked right under his direction and supervision: is that true, Mr. Silk?

A. They did what he told them to do.

Q. Wasn't he the yard foreman who directed them in their duties?

A. Oh, I don't think so. They were told what to unload, where to unload it. He supervised.

Q. Just a minute. I think I know what is wrong. Some car loads of coal that came in were unloaded on about a ten-cent-a-ton basis; is that true?

A. We had some types of coal.

Q. All right, some of it was unloaded on a so much per ton basis?

A. That is right.

Q. Mr. Irvia Wall contracted to unload those cars for a number of years for you; is that true?

A. Not that I know of. I can't recall it if he has. He is our night watchman.

Q. Well, I have been told.

A. He is at present the yard foreman. There is no question about it.

The COURT. How were the trucks loaded in the yard to get the coal trucked out? The truckers load them themselves?

A. They load them themselves.

The COURT. They shovel the coal off the pile?

A. If I may I will explain. They unload by hand themselves. They load by hand wherever it is possible. We have an electric conveyor to make it easier for them to load the coal and don't charge them anything to use it, just to get it out that way.

The COURT. You furnish an electric conveyor?

A. That is right, without charge, and that is to expedite deliveries.

59 By Mr. KING:

Q. Mr. Silk, you say there are two types of unloading. Go ahead and explain that.

The COURT. He has done that.

A. I have done that. One is by the machine, a certain amount by per ton, and the other by hand.

Q. Do you have certain people, which we will call yard man, who work under your yard foreman's direction on an hourly basis to help unload coal?

A. As far as I know I can't recall it. I can't recall it now.

Q. In other words, except for what you said a while ago when you said you had a difficult car to unload, the parties were paid by the hour, and otherwise it was unloaded on a per tonnage basis?

A. I don't think you get a correct picture of it.

Q. No, I don't.

A. If the yard foreman needed help, couldn't get the yard maintained, couldn't get the orders out if they wanted them, there were people given him, or help given him to clean up and help them get out. He could put on extra help.

Q. He could put on extra help?

A. That is right.

Q. And they were paid on the hourly basis?

A. They were paid on the hourly basis just for that kind of work.

Mr. GLENN. Is there any claim here made for those men on an hourly basis; are you claiming them to be exempt?

A. I am not claiming anything. What do you mean?

Mr. GLENN. The men whom you just testified that they are not ordinary employees.

Q. They are not ordinary employees?

A. No.

Mr. GLENN. All right.

A. They come and go.

The COURT. Is that all this witness?

60 Mr. KING. That is all.

Mr. GLENN. That is all.

PAUL TAYLOR, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. GLENN:

Q. Please state your name.

A. Paul Taylor.

Q. Where do you live at this time?

A. Wichita.

Q. What is your business now?

A. I am connected with the Firestone Tire and Rubber Company.

Q. At one time were you employed by Albert Silk in Topeka?

A. Yes, sir.

Q. For what period of time?

A. Thirteen years and eleven months, to be exact.

Mr. KING. If the Court please, the Government moves the exclusion of the witnesses from the room at the present time for the reason that there are interested parties present and there is testimony that will come forth from the witness that will be prejudicial to their reasoning. This is largely a matter of recalling instances that happened some years ago, and they may be greatly influenced by the fact of someone giving testimony who is their boss or superior or who now is.

The COURT. He is not working there now. This doesn't apply to this particular witness?

Mr. KING. For the further reason, if the Court please, there are witnesses who will testify here who are working together.

The COURT. This man isn't one of them. Can you renew your motion at a later time?

61 Mr. KING. All right, thank you.

By Mr. GLENN:

Q. When did you leave the employment of Mr. Silk?

A. May 1, 1943.

Q. During the time you were employed by Mr. Silk, what was the nature of your duties?

A. I was keeping books, taking orders over a telephone.

Q. Were you in the same office room with Mr. Silk?

A. Yes, sir.

Q. As a matter of fact, just for the purpose of the record, there is one large room with two large desks or tables in it, is there not?

A. Yes, sir.

Q. How close was your desk to Mr. Silk's desk?

A. The two desks joined together. We faced each other.

Q. Within hearing distance of each other?

A. Yes, sir.

Q. Are you familiar with the manner or method in which the coal haulers delivered coal there?

A. Yes, sir.

Q. Are you also familiar in a general way with the way in which the coal unloading was done or arranged there?

A. Yes, sir.

Q. Did Mr. Silk own any trucks of his own during the time you were there?

A. No, sir.

Q. State if you know who owned the trucks that were used in delivering coal?

A. The men that were doing the hauling owned their own trucks.

The COURT. What do you call them?

A. Truckers, independent truckers.

By Mr. GLENN:

Q. Were those men required as far as you know to carry the name of the Silk Coal Company or Albert Silk on their trucks?

A. No, sir.

Q. Were they required as far as you know to have the telephone number or address of Albert Silk on their trucks?

A. No, sir.

Q. Did you ever hear Mr. Silk request any of these
62 truckers to carry his name or telephone number or address on the trucks?

A. No, sir.

Q. Mr. Taylor, when a coal order was received, who took the order, who would take the order?

A. Either Mr. Silk or myself.

Q. Then what was done with it when you took the order, what procedure was taken in handling it?

A. It was written up on a ticket. Everything was filled in but the weight of the truck and the driver that was going to take the coal.

Q. Were these drivers requested to report for duty at any particular time of the day?

A. No, sir.

Q. Tell the Court what the actual fact was about the time they were to come.

A. Some of them managed to get there early in the morning because as a rule there were always better orders the first thing

in the morning. Others would show up maybe nine or ten o'clock in the morning. There was no set time. It was there for them to be there.

Q. Were they required or requested to come in every morning?

A. No, sir.

Q. Was there any requirement or request about the time they should leave in the evening?

A. No, sir.

The COURT. No requirement as to hours?

A. That is right, sir.

Q. What arrangement was there if any about who would take a particular order?

A. One of the drivers fixed up a board with a bunch of nails on it. Each man had a check which he had fixed up with his name on it. The top man was the first on for the order. If he didn't want it, he turned it down, and the next man had the chance on it. When the top man took the order he took off his check and put it on the bottom. That was the arrangement between themselves.

Q. Did you or Mr. Silk either have anything to do with working out that plan?

63 A. No, sir.

Q. If a man didn't want it, usually he turned it down. Explain to the Court if a man came in——

A. (Interrupting.) If a man came in in many cases he would ask where the coal was to go to. And if he took it, he had the address and we told him the place, and if he thought it was a place a little harder than some others, he would say he didn't want the order.

Q. Did that actually happen frequently?

A. Yes, sir.

Q. Would you say it happened on the average of once or more a day?

A. I would.

Q. If a man was called in and asked about taking an order and turned it down, what did you do?

A. Ask for the next man to come in.

Q. There was a bell, or buzzer arrangement, as I understand it?

A. Yes, or sometimes that particular driver that was in there would go in there and tell the next man to come in.

Q. Did you have anything to do at all about determining yourself which man would be the next one to come in?

A. No, sir.

The COURT. If a man turned down an order, his name went to the bottom?

A. I couldn't tell you how that worked out, whether they took the check off or not.

By Mr. Glenn:

Q. What reason would they give if any about why they didn't want to take an order?

A. Sometimes they wouldn't give any reason, and other times they would say they didn't want to go to that particular place.

Q. How were these men paid; Mr. Taylor, at what times were they paid?

A. Every week, and they could draw in between times if they wanted to.

Q. As a matter of fact did they draw some in between times?

A. I don't think there was but one or two that didn't draw during the time I was there.

Q. In other words most of them did?

A. That is right.

Q. On what basis were they paid for the hauling?

A. So much per ton.

Q. Did that rate vary some during the years?

A. It did during the period of years; yes. I think it started in—pardon me, do you want the amount?

Q. That is right.

A. I think it started at seventy-five cents a ton. And it raised to eighty-five.

Q. Was that on domestic coal?

A. That is on domestic coal.

Q. Was there a different rate on commercial coal?

A. Yes, sir.

Q. Do you recall what that was?

A. Fifty cents when we started and raised to sixty.

Q. Tell the Court something about this building where you say these men had the board.

A. It used to be our office. His business got so heavy there was too many people in there, such a small place, that we built this new office on the east side of the scale. Then we used that former office for storing some records, had some stokers in there, and the drivers stayed in there when the weather was bad.

Q. Did Mr. Silk furnish shovels for the men?

A. No, sir.

Q. The truckers, did he furnish forks for them?

A. No, sir.

Q. Or wheelbarrows?

A. No, sir.

Q. Do you know who furnished the shovels and the wheelbarrows?

A. The men themselves.

Q. Did Mr. Silk furnish oil and gas for the trucks?

A. No, sir.

Q. Did he furnish tires or repairs for the trucks?

A. No, sir.

Q. Do you know who did furnish those things?

A. As far as I know the individual furnished everything.

Q. You mean for his own truck?

65 A. That is right.

Q. Was there any requirement to your knowledge by Mr. Silk that these men would buy their gas and oil at any particular place?

A. No, sir; they bought wherever they wanted.

Q. Was there any requirement about their buying their tires or having their repairs made to their trucks at any particular place?

A. No, sir.

Q. Was there any allowance made by Mr. Silk for this except the regular rate per ton?

A. No, sir.

Q. Do you have a recollection of days when Mr. Silk did not have enough haulers for taking care of the business?

A. Yes, sir.

Q. Just tell the Court something about that.

A. Well, there was a number of times, there wouldn't be enough drivers to take care of orders. Naturally people would want coal at a certain time, and if they didn't get it, they would call up and cancel the order. That has happened a good many times. If weather conditions weren't pleasant I have seen the drivers many a time turn down orders and stay in the room there where they were, turn down orders and refuse to take orders.

Q. If a driver took an order, was he required to come back to the office after he had delivered the order?

A. No, sir.

Q. As a matter of fact, can you tell the jury whether there were times when drivers did not return after they had taken deliveries?

A. Will you please restate that?

Q. I didn't get it in very good language. Do you know of any instances when the drivers did not return after they had made deliveries?

A. Yes, sir.

Q. Just explain to the Court please.

A. Well, they would leave with an order sometimes early in the afternoon. Maybe they would take a notion to go hunting or something, and they didn't return at all.

Q. Do you recall the time when some of the men went to Liberal, Kansas?

66 A. Yes, sir.

Q. Tell the Court about that.

A. Well, they just left and went to Liberal. That is about all I can tell you about it.

Q. Was there any arrangement made as far as you know with Mr. Silk or anyone else in the office for them to be gone?

A. No, sir.

Q. Did they ask anybody's consent to be gone?

A. No, sir.

Q. Or did you know that they were leaving in advance of the time that they actually left?

A. No, sir.

The COURT. What did they go to Liberal, Kansas, for?

A. I couldn't tell you that.

Q. Do you know whether these men hauled for other people during the time they hauled for Mr. Silk.

A. Yes, sir.

Q. Tell the Court about that.

A. Well, practically all of them have hauled coal for other concerns there. A couple of them in particular. Most of them have hauled grain, houshold goods and some stock, just doing a general line of hauling, whatever they could pick up.

Q. Have you received telephone calls at Mr. Silk's office for men to come out and haul other things for other people?

A. Yes, sir.

Q. Tell the Court about that.

A. Well, people would call up and ask for such and such a man. In many cases we just call him and let him answer the phone, and he went out and did the work, whatever was to be done.

The COURT. Will all this testimony be cumulative?

Mr. GLENN. There are or may be come other points. When the men were not busy working on deliveries, were they required to do any work around the yard?

A. No, sir.

Q. Do you know what they did when they were not hauling?

67 A. Yes. I would be in the room a number of times. They played cards and did things like that.

Q. Do you have knowledge of instances where some of the men went hunting instead of doing their hauling?

A. Yes, sir.

Q. Tell the Court about that.

A. Well, I can recall two particular men that went hunting a number of different times together, Leonard Gray and George Kirby. They left the job and went hunting.

Q. Would they make any arrangements in advance to be off?

A. No, sir.

Q. Or about how long they would be gone?

A. No, sir.

Q. How would you find out then about what they did?

A. As a rule, they would always tell us the next day.

The COURT. What did they hunt for; quail out in there?

A. Yes, sir; a little bit of everything.

By Mr. GLENN:

Q. Were there any written contracts between the men and Mr. Silk?

A. No, sir.

Q. If there had been, you would have known?

A. Yes, sir.

Q. Were there any instances, Mr. Taylor, to your knowledge, where men who owned their own trucks, would sometimes send other men to drive the trucks for them?

A. Yes, sir; that has happened.

Q. Tell the Court about that.

A. Well, one man went to work in the auditorium, at the auditorium, and he sent another man to drive his truck. I can't tell you his name. There have been instances where some of the men have been ill and sent other men to drive their trucks. I couldn't name the particular man right at present.

Q. But you do know it happened?

A. Yes, sir.

Q. Anything else?

A. Not that I recall right now.

Q. As far as you know who bought the license tags for the trucks?

68 A. The independent owners of the trucks.

Q. Did Mr. Silk to your knowledge ever buy any of those tags?

A. No, sir.

Q. You said a moment ago that some of these truckers hauled for the other coal dealers. Can you name the ones that hauled for others that you know about?

A. They have hauled for the Central Coal Company, H. Morton White Coal Company, Morris Coal Company, and some of them have hauled direct from the mines.

Q. You mean for other dealers or individuals?

A. Well, both.

Q. If a man, a helper was needed, what arrangement did he make to get a helper?

A. He got his helper himself.

Q. If a man got his helper, each man got his own helper if he needed one?

A. That is right.

Q. There has been some testimony, Mr. Taylor, about the use of chutes. About what percentage of the orders required chutes?

A. I would say less than one percent.

Q. At times chutes would be required, then would the truckers use them?

A. They might in some cases. I know of cases where chutes were requested to be used where they weren't used.

Q. Would that happen occasionally?

A. Oh, yes.

Q. No: as to unloaders, would you tell the arrangement which Mr. Silk had for the unloading of coal from the cars into the yard?

A. Men were unloading it, and at a given rate per ton of coal.

Q. Who furnished the equipment they needed?

A. They furnished their equipment.

Q. Who set the hours they would work?

A. They worked their own hours.

Q. What instructions were given, if any, to these men about what they would do in unloading the coal?

A. The only instructions I know was to put the coal at a certain place and to unload it as quickly as possible.

69 Q. Who carried the insurance, if you know, on these trucks?

A. The individual owners of them.

Q. I believe that is all. No; pardon me a moment. Do you know whether or not there was any state law or city law which required that insurance?

A. The state law required them to carry that insurance.

Q. That is your understanding of it?

A. That is right.

Cross-examination by Mr. Fisher;

Q. Mr. Taylor, how long did you say that you were with Mr. Silk?

A. Thirteen years and eleven months.

Q. What can you say about the regularity of these men who appear each morning to do the trucking for the company?

A. As to the time they get there?

Q. No; as to whether the same men appeared? Isn't it true that a great number of men come pretty regularly for hauling?

A. No; they come regularly, but there was——

Q. (Interrupting.) But the same men would show up day after day for a long period over a period of years?

A. That is right.

Q. Quite a number of them. How many were there of them at that time on your list?

A. Oh, I would say half a dozen.

Q. You could always count on men being there in the morning?

A. No; we did not have no way of knowing whether they would be there or not.

Q. These men would show up day after day for years, you said.

Mr. GLENN. If the Court please, that is repetition. He has asked that question.

Mr. FISHER. All right.

The COURT. When you went down every morning, you always knew that some of these men would be there?

70 A. No; we didn't know for sure.

The COURT. You cannot count on them?

A. No.

The COURT. You knew when you went down in the morning, you knew there would be some men there to haul?

A. Yes; we thought there would be.

By Mr. FISHER:

Q. When a man reported from this place where they stayed to take out, go out on a trip, was that man never turned down?

A. As far as an order?

Q. On a particular trip.

A. To my knowledge I can't recall any.

Q. You mean you always sent out the man who reported, is that what you mean to say?

A. As far as I can remember we have, unless a customer might happen to ask for a particular person.

Q. A customer often did that, didn't they?

A. They have; yes.

Q. Isn't it a common thing for them to do that?

A. No, not awfully common. They have asked for it.

Q. Then when a man on the list showed up, what did you do, if he wasn't the man that was requested?

A. We would give him a different order.

Q. A different order, but you sent the next man out on this trip for which you had rung the bell?

A. I have you mixed up a little now.

Q. Do you mean if the man that the customer had asked to bring the coal, how did you get him, just tell us that?

A. I would ring the bell, and the next one would come in, the one that was on top. If we didn't have an order we told him that we had an order for this particular man.

Q. Then what did you do with the man that appeared?

A. If we didn't have an order, he went back and waited for his turn.

Q. You mean if you didn't have another order, a second one?

A. That is right.

Q. You had a number of orders at a time often, didn't you, when you rang the bell for the yard man, the drivers?

71 A. Yes, sir.

Q. Did you do the assigning then?

A. No, sir.

Q. Who did the assigning?

A. Mr. Silk gave the orders.

Q. It was given by Mr. Silk or someone working for him?

A. Yes.

Q. If you had two orders come in at one time, Mr. Silk would pick the men to go on each one?

A. No; we would give them the order, and most cases he would say like, "I have got two of them going such and such a place, three of them going here," and let them pick their orders.

Q. Call in one of them at a time?

A. No; as a rule one man came in.

Q. One man came in at a time and he would let him pick the place?

A. Yes.

Q. Then the next man for the next order?

A. He would have his choice.

Q. And you rang the bell again?

A. That is right.

Q. If there was a third order, you rang the bell again?

A. That is right.

Q. And you sent him out on whatever was left?

A. That is right, if he wanted it, if he didn't he refused the order.

Q. Did you have drivers that weren't satisfactory for anything?

Mr. GLENN. I object to the form of the question.

The COURT. I suppose every business has hired men they have to let go.

Mr. FISHER. That is what I was going to ask him myself.

The COURT. You may assume that would be the case. I don't think it is necessary to go into it, do you?

Mr. FISHER. I was just going to ask him if he didn't have to let drivers go occasionally.

The COURT. Did you ever discharge anybody?

A. No, sir.

72 By Mr. FISHER:

Q. There was never any driver so unsatisfactory you had to let him go?

Mr. GLENN. I object to the form of the question.

Mr. FISHER. I think that is proper cross-examination.

The COURT. Answer the question.

A. No, sir; as far as I know there was never a man released.

By Mr. FISHER:

Q. A man was never discharged by the company for anything while you were there?

A. As far as I know there never was.

Q. What changes occurred with respect to men quitting and starting again, or otherwise coming in? That was a common thing, was it?

A. To the individual quitting and starting?

Q. Yes.

A. Yes; quite often.

Q. Was there a considerable turn-over or not?

A. Oh, we had quite a few different men during the time I was there.

Q. Men would often quit?

A. Yes, they do.

Q. Was it a common thing for a man to report to you, for men to report to you when they were staying away from work or quitting work during the day?

A. No, sir.

Q. It was not?

A. No, sir.

Q. None of the men made a practice of reporting to you at that time?

A. No, sir; it has happened. Some of them have said they would be gone, but there wasn't any common practice.

Mr. FISHER. That is all.

Mr. GLENN. That is all.

CLAYTON OLDHAM, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

73 Direct examination by Mr. GLENN:

Q. Your Honor, he is no longer employed there. State your name.

A. Clayton Oldham.
Q. Where do you live?
A. Topeka, Kansas.
Q. Where are you now employed?
A. Santa Fe.
Q. How long have you been employed at the Santa Fe?
A. Two years with the Santa Fe Railroad; two years and two months.
Q. Back several years ago what were you doing?
A. Trucking.
Q. Did you do any trucking for Albert Silk or the Silk Coal Company?
A. Yes, sir.
Q. Who owned the truck that you used?
A. I did.
Q. Who boughf the oil and gas for the truck?
A. I did.
Q. Who bought the tires for the truck?
A. I did.
Q. Who paid for the repairs on the truck?
A. I did.
Q. Who bought the license tag for the truck?
A. I did.
Q. Did you have a license as a driver or chauffeur?
A. Yes, sir.
Q. Who obtained that?
A. I did.
Q. What did you haul for Mr. Silk?
A. Coal.
Q. Can you fix the years when you did that?
A. Yes, sir.
Q. Will you do it, please?
A. 1936, 1937, and 1938.
Q. During that time did you haul for anyone else?
A. Yes, sir.
Q. What did you haul for other people?
A. Hauled ice for the American Ice Company.
74 Q. Ice, you say?
A. Ice for the American Ice Company.
Q. What else?
A. Rock wool for the Parker Insulating Company.
Q. What else?
A. Cream and milk for the Beatrice Creamery.
Q. What else?
A. Coal for the Central Coal Company.
Q. And what else?

A. Oh, odd jobs such as furniture; I hauled some of that, and some livestock and grain.

Q. Did you haul any rock or building material?

A. I hauled some rock, but that was an individual. I couldn't tell you the name right now.

Q. How did you get these jobs of hauling?

A. Some of them was telephoned in to me through Silk's office.

Q. How did you get the others?

A. Oh, just various ways. Some telephoned to my place.

Q. From people you knew?

A. Yes, sir.

Q. When you were hauling for Mr. Silk, tell the Court whether you were required or ever requested to be there at any particular time.

A. Never was any request to be there at any time to my knowledge.

Q. Was there any requirement or request that you stay until a certain time in the evening?

A. No, sir.

Q. Was there any requirement or request as to whether or not you would go home for your lunch?

A. No, sir.

Q. What was your practice about coming down in the morning?

A. Oh, we usually got there about the time they got there Most of the orders were the best in the morning.

Q. Is that why you went early?

A. Yes, sir; I am after the money.

The COURT. What difference would there be in the orders? What is a good order?

75 A. The day's run, they started pretty good in the morning and the men who would get out——

The COURT. You got more orders in the morning?

A. That is right.

The COURT. Would you get more money on one order than on another?

By Mr. GLENN:

Q. How were you paid?

A. By the ton.

Q. If you had a five-ton load?

A. I figured that way.

Q. You would make more money?

A. Yes, sir.

Q. Were the early morning hours for larger loads as a rule?

A. I couldn't say that so.

The COURT. How about the distance of the haul?

A. Distance of the haul, that would make no difference.

The COURT. Why not?

A. You mean the price of coal for the distance, whether it made some difference? There was exception made for outside the city limits. He paid more.

By Mr. GLENN:

Q. What was your practice if you didn't go down early in the morning, when would you go down?

A. Whenever I would get around to get down.

Q. Would you at times make other trips before or deliveries before you went to the Silk place in the morning?

A. Yes; I have done some stuff.

Q. When did you leave in the afternoon?

A. Well, if I had something else to do I would go and do it and leave.

Q. After you made a delivery for Mr. Silk, would you have to report back to the office?

A. Absolutely not.

Q. As a matter of fact, as a matter of practice, did you usually report back to the office?

A. No, sir.

76 Q. Were you required to carry Mr. Silk's address on any of your trucks?

A. No, sir.

Q. Were you required to carry his telephone number on your truck?

A. No, sir.

Q. Were you required to carry any kind of sign or insignia of such showing you were hauling for him?

A. No, sir.

Q. When an order was given to you, Mr. Oldham, tell the Court what right if any you had to refuse that delivery.

A. Well, just like doing anything else under contract. You figured there wasn't enough money in it, you could turn it down.

Q. Did you have any kind of a written contract with Mr. Silk?

A. No.

Q. Did you as a matter of fact turn down orders?

A. I will say I have.

Q. For what reason did you do that?

A. Well, a bad place or wasn't enough money in it?

Q. Explain to the Court how this board, call board or whatever it was, explain how that worked.

A. Oh, it was a little board that someone of the truckers there figured out. They kind of quarreled over which one was next, like any bunch of men would. One was trying to beat the other,

the man that took his order out, and he hung his number on the bottom of the list after he got the order. He worked up to the top, and when the bell would ring someone would holler out the name and he would go over to the office.

Q. What did you do in the time when you were at the yard and not actually hauling?

A. Do anything you want to if you were down at the bottom and orders wasn't moving very swift. You could go up town and come back.

Q. Did you have to ask anyone to do that?

A. No, sir.

Q. If you wanted to be gone a half a day or day, or if you were gone a half day or a day or any length of time, did you have to make any arrangements with Mr. Silk about it?

77 A. No, sir.

Q. Who owned what tools you had on your truck?

A. I did.

Q. That was your shovel and what else?

A. Shovel, a fork, a pick, and wheelbarrow.

Q. There has been some testimony here about the use of chutes. Tell the Court about how the chutes would be used and how often.

A. Well, I think they have been testifying about one percent, and I think that is about right. The chutes were there in the yard, and whenever they called and we figured you could use one, we picked up his chute and used it.

Q. Ever get by without using it?

A. We didn't use it lots of time. We took a chute out and didn't use it. Have to go over a fence or something.

The COURT. Did you have the same of truck; make of truck?

A. No; they was the same size practically, ton and a half; Chevrolets and Fords.

The COURT. The kind where you could dump the body up so it could be very easily unloaded.

A. Never had but one dump truck on the job. The rest of them was all straight trucks.

Mr. GLENN. I believe that is all.

Cross-examination by Mr. KING:

Q. Mr. Oldham, what was your main source of income from September to March during the years from 1936 to 1940?

A. The main source?

Q. That is right.

A. 1936 to 1939?

Q. No; 1936 to 1940.

Mr. GLENN. To which we object as incompetent, irrelevant and immaterial so far as this question is concerned.

The COURT. Objection sustained. You may ask him how much money he made from Mr. Silk.

By Mr. KING:

Q. I thought it would save a little trouble. Approximately how much were your earnings from September to March in the years 1936 to 1939 inclusive?

Mr. GLENN. I make the same objection.

The COURT. Objection overruled. From Mr. Silk, you mean?

Mr. KING. That is right.

A. I wasn't there in 1938.

Q. I mean 1939.

A. You said to 1939.

Q. Well, how long did you work for him?

A. 1936 to 1938.

Q. All right, during those years what was your average earnings per month?

A. I don't know. I could just guess at it.

Q. That is all right; from September to March.

Mr. GLENN. To which I object.

The COURT. Objection overruled. Just from coal hauling from Mr. Silk.

A. You mean the three years, 1936, 1937, 1938; three seasons?

Q. I mean just your average monthly earnings.

A. You want the amount?

Q. Yes; I want your average monthly earnings.

The COURT. One hundred or two hundred dollars or what, per month?

A. Oh, I would say one hundred and seventy-five maybe.

Q. One hundred and seventy-five dollars a month?

Mr. GLENN. The reason for my objection, and I wish to object again, I don't know if this is used for computing a tax.

Mr. KING. No, it is not.

Mr. GLENN (continuing). As a basis for computing a tax if one should be due.

The COURT. That doesn't make any difference.

Mr. GLENN. Well, it just isn't accurate enough for that purpose, if that was the purpose for asking.

By Mr. KING:

Q. During this same period of time now, what was your average earnings from all other work that you performed with your truck for outsiders, for others than Mr. Silk?

Mr. GLENN. To which we make the same objection, incompetent, irrelevant, and immaterial.

The COURT. Objection overruled.

A. Ain't any way of knowing. I have to guess. One way of guessing would be as good as another.

By Mr. KING:

Q. You guessed as to the amount you made from Mr. Silk. Did you make half that much from outside sources?

A. Half of one hundred and seventy-five dollars?

Q. Yes.

A. Oh, I would say twenty-five of it.

Q. Twenty-five dollars a month?

A. Twenty-five of the one hundred and seventy-five I made in outside sources. That is what I am trying to get in.

Q. Let's go back, then. You made about one hundred and fifty dollars from Silk?

A. That is right.

Q. From Mr. Silk, and about twenty-five dollars average from outside hauling; is that right?

A. Yes; now that is for the six months' season I worked there.

Q. That is right, from September to March.

A. Okay.

Q. And that would apply for the years 1936 to 1938, inclusive?

A. Yes, sir.

Q. How long did you work with Mr. Silk?

Mr. GLENN. I object to it as repetition. He has testified to it two or three times.

The COURT. How long did you work for him?

80 A. 1936, 1937, 1938, but you see that is three a season; now wouldn't figure out three years.

Q. I know. Mr. Oldham, you said that you would leave at various times, and you did not have to come to work at any time; any particular hour?

A. That is right.

Q. Were you pretty regular in appearing?

A. Pretty regular, as regular as any man is when he has to eat.

Q. Mr. Oldham, do you say that you left, and when you did you never reported to Mr. Silk or anybody in the office that you were going to leave, as to approximately when you might return?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you carry signs of Mr. Silk during the years of 1936 to 1937?

A. Oh, I think there was a short time there I carried them. It wasn't compulsory.

Q. I didn't ask you that, and I ask that that be stricken from the record.

The COURT. Objection overruled.

Q. Did you carry signs during the years 1936 and 1937?

A. I did in 1937.

Q. When did Mr. Silk have these signs made?

A. I don't know.

Q. Do you know if it was in the year 1936, if I refresh your memory?

A. They was there when I was there. I don't remember.

The COURT. Signs referring to Mr. Silk?

A. I don't know.

The COURT. Did he ask you to carry them?

A. No, sir.

Q. Did anybody ask you?

A. No, sir.

By Mr. KING:

81 Q. Isn't it true, Mr. Oldham, the yard foreman told you they were there and anybody who was a truck driver could put them on his truck?

A. Never told me that.

Q. He never told you that?

A. Never told him that.

Q. Did you ask permission from anybody to put the sign on your truck?

A. No, sir.

Q. You just automatically put them on?

A. Sure.

Q. What did the sign say?

A. Silk Coal Company.

Q. Any phone number?

A. I don't remember if there was a phone number or not.

Q. Mr. Oldham, isn't it true that at times when this bell was rung and the man that was at the top of the list went over to the office that he was refused an order and that another man had to take his place to take it? In other words, the office would not give him the order even though he was first up?

A. I can't say that I know anything about that.

Q. Do you know of any time the man who was first up went over, and came back, didn't want it?

A. Yes; but I don't know why he didn't want it.

Q. You do not know why he did not haul it?

A. I wasn't in there.

Q. About one out of every one hundred times that you made a trip, was the only time you took a chute?

A. That is right.

Q. About once out of one hundred?

A. Yes.

Mr. GLENN. That is all.

Mr. KING. That is all.

82 GEORGE KIRBY, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. GLENN:

Mr. KING. I believe this man is working there at the present time and I again ask that the rule be invoked.

The COURT. We are not going to call any more.

Mr. KING. Is this the last one?

Mr. GLENN. I have all these here.

The COURT. I don't care. It is just cumulative.

Mr. GLENN. I do have one unloader that I would like to put on.

The COURT. He will just testify as to the others. I don't care to have any additional facts to be brought out. Have you heard the last witness testify?

A. Yes, sir.

The COURT. Will your testimony be the same as his?

A. Yes, sir.

The COURT. All right; that is all.

Mr. GLENN. I just wanted to ask this one question. How long has it been since you have taken a chute on a job; a delivery?

A. It's been so long I can't remember that, a year anyway. I don't carry now any chutes at all.

By Mr. GLENN:

Q. What do you do about taking a chute in cases where the office tells you a chute has been requested?

A. I don't take the work.

Q. You mean you turn it down?

A. Yes, sir.

Q. There is one other thing I want to show by this man. There was some testimony here, testimony by Mr. Taylor about the truckers going hunting. Are you one of the men that went hunting?

A. Yes, sir.

83 Q. Was that a regular occurrence?

A. Yes, sir.

Q. Did you make any arrangements in advance about going hunting?

A. Not with Mr. Silk.

Q. That is what I mean. How long would you be gone if you went hunting?

A. According to when I left.

The COURT. One day, two days, or a half day?

A. Left in the afternoon and got back in the evening sometime; never come back in the forenoon.

By Mr. GLENN:

Q. Otherwise on all other points your testimony is about the same?

A. That is right.

Cross-examination by Mr. KING:

Q. Mr. Kirby, how long did you work for Mr. Silk?

A. Well, I started in helping on trucks there when I was about thirteen years old, I guess, from 1927 up.

Q. You worked for about fourteen years for him?

A. Something like that.

Mr. GLENN. If your Honor please, I object to the form of the question, working for Mr. Silk, with this witness. I did not go into that.

The COURT. Yes.

Mr. GLENN. It carries an inference.

The COURT. You worked at Mr. Silk's place, did you?

Mr. KING. I beg your pardon.

A. Yes.

The COURT. The question is whether he came under the terms of the Act.

Mr. GLENN. That is it.

By Mr. KING:

Q. Approximately what were your earnings per month during that time?

Mr. GLENN. To which we object.

84 Mr. KING. Let me finish the question, please. Approximately what were your earnings per month from Mr. Silk's Coal Com'any during the time, months of September to April of the years 1936 to 1939 or 1940 inclusive?

Mr. GLENN. Object to that. We didn't go into those matters on direct examination.

Mr. KING. Well, it is the same thing as the other one.

The COURT. Go ahead; what were they?

A. That would be hard for me to answer, as I don't know how much money I made.

By Mr. KING:

Q. I mean just your per month earnings.

The COURT. Did you earn two hundred dollars per month, one hundred and fifty, or what?

A. Oh, around thirty dollars a week.

Q. Is that your total earnings, or just from Mr. Silk.

A. Mr. Silk.

Q. That was about thirty dollars a week from him?

A. Yes.

Q. All right. What did you make from any outside source whatsoever during this same period of time?

A. Oh, it run all the way from three or four dollars a week to fifteen or twenty, and that didn't happen every week.

Q. Did you report pretty regularly at seven o'clock in the morning?

A. I did.

Q. Did you ever ask permission to leave?

A. No, sir.

Q. Not from anyone?

A. No, sir.

Q. What years did you carry a sign: Mr. Silk's sign on your truck?

A. I guess part of one year, about 1936 to 1937. I don't remember.

Q. How did you come to use the sign, please?

A. It was laying around and I picked it up.

Q. When did Mr. Silk have the signs made?

A. I don't know.

Q. Do you know if he had them made?

85 A. No; I don't know who had them made.

Q. Mr. Kirby, do you know at any time the man who was at the top of the list for an order, that the office didn't use him, refused to let him take any order? Do you know if there were any such times?

A. No; I couldn't say that there was.

The Court. Did they get someone else to take that order?

A. I never was turned down.

Q. You never were turned down?

A. No, sir.

The Court. Do you know of any case where the customer asked for a particular driver?

A. Yes; they have done that.

The Court. Then the man at the top of the board didn't get that order, did he?

A. That is according. If the man they had asked for was not hauling.

The Court. Suppose he was there and come in?

A. I don't know anything like that, how they worked it.

Q. You said too that they have a number of people, or that you had a number of people that you had hauled for a number of years, and they sometimes requested you to make a particular delivery?

A. Well, yes; I have got I think two in Topeka.

Q. Only two?

A. That is my friends of mine that I haul coal to. I don't know as they request it.

The COURT. But you get their orders?

A. That is right.

Q. These tickets you receive from the office when you go to get an order, Mr. Kirby, do they have on them the amount of coal you are to take?

A. Yes.

Q. And the kind of coal?

A. Not all.

Q. Not always?

A. Not always the kind.

Q. Usually they have the kind of coal though, don't they?

A. Well—

Q. I mean there are twenty-one different kinds of coal down there; is that right?

A. That is right.

Q. Do they usually have that?

A. Some of them has mine run coal on it. That can mean any kind of coal.

Q. Who tells you where to go to get that coal?

A. Well, I just been there long enough to know where it is all there.

Q. Does the yard foreman direct the activities of the truckers as to which bin they are to get the coal out of? Hasn't that been the practice for years?

A. He does to a certain extent, but they ain't very many of them pay any attention to him.

Q. Do the tickets have the price to be charged on them?

A. Some of them has got the price on and some don't.

Q. Has Mr. Silk ever told you not to deliver coal unless you collect the price beforehand?

A. When it says collect on the ticket.

Q. Just answer the question. Has Mr. Silk ever told you?

The COURT. I think he has answered that question.

A. It says so on the ticket.

Mr. KING. I didn't get his answer.

The COURT. When it says collect, he collects?

A. Yes; I will collect when it says collect on it. I don't know whether he tells me personally or not. It is all there in these red letters, and you can't miss seeing it.

Q. You mean the tickets also say the size of chute you should take?

Well, they have never had size of chutes on them.

Q. What about plan's? Who furnishes them?

A. I suppose the coal yard furnishes them.

Q. You don't know who furnishes you the planks?

A. They are there at the coal bin.

87 Q. Do you use the electric coal loader in your truck at times?

A. Yes, sir.

Q. In most cases is that true?

A. No; the years you are talking about we did not; very seldom used them.

Q. Why? I mean it would be easier than to load by hand.

A. Sure, it would.

Q. Why didn't you use that?

A. I don't know.

Mr. KING. I think that is all.

Mr. GLENN. That is all.

JOE HEBERLING, called as witness on behalf of the plaintiff, having first been duly sworn, was examined and testified as follows:

Direct examination by Mr. GLENN:

The COURT. Who is he?

Mr. GLENN. An unloader.

Q. State your name, please.

A. Joe Heberling.

Q. Where do you live?

A. Topeka, Kansas.

Q. Did you live in Topeka during the years 1936, 1937, 1938, and 1939?

A. I did.

Q. What kind of work were you doing at that time?

A. In 1936, I think I was a garage mechanic at that time.

Q. And in 1937?

A. I started at Mr. Silk's.

Q. What else did you do?

A. Well, just anything that come along that I could make a dollar at.

Q. Was that true during 1938 and 1939 also?

A. It was.

88 Q. Mr. Heberling, were you an unloader? Did you do some unloading of coal for Mr. Silk?

A. I did the first three years I worked for Mr. Silk.

The COURT. How many?

A. The first three years.

Q. What arrangement was made with you about the unloading, that is, as to what you were to be paid?

A. I was paid by the ton.

Q. How much per ton was it?

A. If I remember right at that time it was twenty cents.

The COURT. How much?

A. Twenty cents a ton, if I remember right, and that is for hand unloading.

Q. What tools did you need for this unloading?

A. Principally shovel.

Q. Who furnished the shovel?

A. I did.

Q. What else besides a shovel did you need?

A. Well, if it was lump shovel, and the lumps too big, I used a pick.

Q. Whose pick was it?

A. Mine.

Q. What hours if any were you required to work on that job?

A. That was up to me, just how I felt.

Q. Was there any particular time then in the morning when you were supposed to start?

A. No.

Q. Was there any time in the evening when you were supposed to quit?

A. There was not.

Q. Was there any time when you were supposed to take off for your lunch or dinner?

A. No, sir.

Q. Did you as a matter of fact sometimes work straight through on a car?

A. Sometimes worked on it on the installment plan. Well, it was just exactly how I felt. If I felt good, I would work through till I finished the car. If there was another car coming in where I could work on it ahead of somebody else, the more I would work the more I would make.

89 Q. That was all up to you?

A. Yes.

Q. How were you paid for the work you did. That is, when were you paid, by the day or week or job?

A. Well, Saturday night; if I needed it before I would draw any time during the week.

Q. Did Mr. Silk give you any instructions about unloading the coal except where it was to be placed?

A. That is all.

Mr. GLENN. That is all.

Cross-examination by Mr. FISHER:

Q. Mr. Heberling, what did you do when you finished the unloading; did you work any place else in the yard for Mr. Silk?

A. Well, if there was a lot of coal to clean up in the yard, I would work some by the hour; yes.

Q. Did Mr. Silk call you for that work?

A. Well, the yard boss asked me if I wanted to, or I would ask him if there was anything else to do, if I needed a little extra.

Q. Was that a regular kind of work for you?

A. What do you mean by that?

Q. I mean did you do that—there was a good deal of that, was there?

A. Good deal of that; no, there wasn't.

Q. Was it there for you all the time?

A. If I wanted to.

Q. You could do that kind of work any time?

A. Yes, if I wanted; yes.

Q. That was hour work?

A. In the yard.

Q. By the hour?

A. Yes.

Q. What kind of work was it?

A. Well, it was screening, cleaning up the yard.

Q. Were you under the direction of the foreman on that?

A. Well, if I wanted to listen to him. We just worked for ourselves.

Q. Did he tell you what to do?

96 A. He would tell us what needed to be done, and we would go ahead and do it the way we wanted to.

Q. Did you put in full days at this unloading work?

A. Some days, I did; yes.

Q. What is that?

A. Some days I did; yes.

Q. How many days did you put in in a year?

A. Well, I don't know. I never kept track of it.

Q. What is that?

A. I never kept track of it.

Q. I know, but how did it run? How many days a month then?

A. Well, it would run around two-thirds of them.

Q. It was heavier from September to March, I suppose?

A. Oh, yes. That is what I am talking about, from September to March a year.

Q. You put in full time from September to March?

A. No; about two-thirds of the time unloading, and the rest of the time would be part time in the yard when I felt like working.

Q. How did you say you were paid for the unloading, Mr. Heberling?

A. By the ton.

Q. Was all the unloading paid for on that basis or any other basis?

A. All I unloaded was paid by the ton unless it was a bad car, rough bottom full of holes where I couldn't make any time, and I wouldn't unload by the ton. I would unload by the hour.

Q. Was there a good deal of that?

A. There was some.

Q. And other men did the same kind of work, did they?

A. Yes, there were.

Q. There were a number of you unloaders working together all the time?

A. Well, not together. We generally take a car ourselves.

Q. But they were there working at the same time?

A. At the same time; yes.

Q. How many were there of you generally?

A. Well, I don't know just how many there was to be honest about it.

91 Mr. FISHER. I believe that is all.

Mr. GLENN. That is all.

Mr. GLENN. If the Court please, for the purpose of the record we have several more witnesses of the same kind that we offer up to this hour, and we are willing to continue with the testimony if the Court wants to hear it; just making the offer.

The COURT. I don't care to have you do it. It is cumulative, and I have already a clear picture of your case. Unless the defendant's testimony is such that I would care to hear it, you don't need to put it on.

Mr. GLENN. All right then. We rest.

B. M. TYNER, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. FISHER:

Q. What is your name, Mr. Tyner?

A. B. M. Tyner.

Q. Where do you live?

A. Topeka; 401 Lafayette.

Q. What is your work?

A. I am working in the lumber yard now.

Q. Have you ever worked for Mr. Silk?

A. Yes, sir.

Q. When?

A. Well, it was from 1925, I think, on up to about 1935 a little while. I worked for him nineteen years.

Mr. GLENN. Let's get the time fixed.

The COURT. 1925 to 1935.

By Mr. FISHER:

Q. You worked evidently longer than that, if you worked nineteen years, Mr. Tyner?

A. Oh, along through there, when it was.

Q. Did you work after that?

92 A. No, I haven't worked for him since a year ago last September.

Q. What did you do for him since 1935?

A. Until September a year ago.

Q. When did you start at that time, do you mean that was the starting time?

A. No, no; I started before that.

The COURT. Did you start in 1925 and work up until a year and a half ago?

A. Yes, sir.

By Mr. FISHER:

Q. You did not mean then that you stopped in 1935?

A. Oh, no, no. I worked up until a year ago last September.

Q. Yes, I understand you. Tell us about work during the years 1936 to 1939, Mr. Tyner. What kind of work were you doing?

A. Well, I just delivered coal, for Mr. Silk.

Q. How did you start with him delivering coal?

A. How did I start?

Q. Yes; delivering coal. How did you get your work?

A. The starting of it?

Q. Yes.

A. Well, how I started to deliver coal for him, I hauled coal once and used another fellow's truck while he was sick one time, and the next year I bought his truck and went on.

Q. What kind of arrangements did you have with Mr. Silk?

The COURT. You owned your truck?

A. Yes, sir.

By Mr. FISHER:

Q. You had some sort of arrangements about your pay with Mr. Silk?

A. Just the price of pay.

Q. And when you went to work?

A. No; there was nothing said when I should come or when I should quit.

Q. Was there anything said about the hours of work?
A. No, sir.
Q. When did you report?
93 A. When did I report?
Q. Yes; the time of day.
A. Oh, about seven o'clock in the morning.
Q. How did you come to report at seven o'clock?
A. Well, they opened the yard at that time, and ordinarily that is the time for working people to go to work.
Q. How much time did you put in there?
A. Well, just until we got through. Sometimes it was later than other times. I have worked as late as eight o'clock.
Q. You mean until the cars quit coming in?
A. Well, until we got unloaded. We would start from the yard until we got unloaded. Sometimes it would be eight o'clock.
Q. How did you get your calls for this work?
A. How did I get what?
Q. How did you get your calls for this work?
A. [redacted] usually got my orders from the office.
Q. W[redacted] were you at the time the orders came?
A. Well, I couldn't tell you.
Q. Where did you wait, is the question?
A. We waited over in the room we were supposed to wait.
Q. Where was that?
A. Over west of the scales. It used to be the old office.
Q. How did the calls come to you?
A. It come across with a bell.
Q. What happened when the bell rang?
A. Well, whoever was at the top of the list was the man that went in.
Q. Did he always get the order?
A. Well, no.
Q. What happened?
A. Well, there was several reasons why he couldn't get it.
Q. What were they?
A. Well, one of them would be that the customer didn't want that driver. That was the main reason.
Q. In that case what happened?
A. Well, the next man took it.
94 Q. Were there any other reasons why that man didn't get it?
A. Well, other times he wouldn't take it himself.
Q. And why was that?
A. Well, it was on account of the customer and the place.
Q. What happened then?

A. Well, the next man took it. I had customers that I wouldn't deliver at all. We had customers that I couldn't deliver to. Am I right?

Q. Was there ever anything said to you about reporting to work by Mr. Silk?

A. No, sir.

Q. Being available for call?

A. No.

Q. Were you regular in your work there?

A. Yes.

Q. Were there a good many of the men who had been there for a considerable period of time at the same time that you were there?

A. Yes, sir.

Q. How many would you say?

A. Well, I wouldn't say.

Q. Well, a large or a small number.

A. Well, there was maybe two or three percent of them that he could depend on that they would be there.

Q. How many? I mean just an estimate?

A. Well, it would probably be a half a dozen.

Q. How many of you were there all together at the same time generally?

A. Well, there was one time that there was twenty-four of us there, but then they did not have the equipment then that he has now. They couldn't do the work then that he can now.

Q. How many were there usually there?

A. Around ten or a dozen.

Q. About a half-dozen of them were regulars?

A. Yes, sir.

Q. Are any of these men there now?

A. Well, I couldn't say. There is some.

Q. Well, are there some who have been coming there through a period of years yet?

A. Yes, sir.

95 Q. Were you ever reprimanded or called down by Mr. Silk?

A. Yes, sir.

The COURT. Ever what?

Mr. FISHER. Ever reprimanded or called down by Mr. Silk for the work.

A. Yes, sir.

Q. What was the occasion?

A. Well, there was several occasions.

Q. What were they; tell us about that.

A. Well, maybe I didn't do just what I should do.

Q. Tell us; give us some instance.
A. In what way?
Q. Tell us about some of these instances in which you were called down by Mr. Silk. What happened?
A. Well, maybe there was a mess made and the customers kicked about it.
Q. In the delivery of the coal?
A. Yes, sir.
Q. What kind of a mess?
A. Well, it would be dust in the basement.
Q. What happened then?
A. Well, sometimes we cleaned it up and sometimes we didn't.
Q. What do you mean by that?
A. Well, we went back sometimes and cleaned it up, and sometimes they cleaned it up.
Q. How did you happen to go back; Mr. Silk sent you?
A. I was sent back.
Q. You were sent back?
A. Yes, sir.
Q. By whom?
A. Mr. Silk.
Q. Did those things happen often or not?
A. Well, not very often.
Q. Did you have a sign on your truck?
A. I did at one time; yes.
Q. Who furnished the sign?
A. Mr. Silk.
Q. Were there a number of signs there for such use?
96 A. Yes, sir.
Q. Do you remember when they were put there?
A. Well, I couldn't remember what year; no.
The COURT. Did he ask you to use them?
A. No; he did not tell us to use them, but he said they was there.
Q. How long did you say you used the sign?
A. Well, I wouldn't say. I don't remember how long I did use it.
Q. Was it a long period of time or a short period of time?
A. It was just a short period of time.
Q. Did you ever have an accident, or rather, did you ever do any damage making deliveries?
A. Well, yes; we broke windows and such as that.
Q. What happened then?
A. Well, Mr. Silk put them in.
The COURT. Did he charge them to you?
A. No, sir.

By Mr. FISHER:

Q. Do you have a business of your own in trucking, Mr. Tyner?

A. No, sir.

Q. Was this the only work you did of that sort?

A. Yes; only through the summer. Through the summer I generally went and hauled wheat.

Q. Then over this period of time you are talking about in which you worked for Mr. Silk it was part of September and March of each year; is that right?

A. Somewhere around there; yes.

Q. During the winter months?

A. Yes.

Q. Did you make practically all of your income during that period of time from Mr. Silk?

A. Yes.

Q. Did you have an understanding with Mr. Silk about following directions there of anyone, Mr. Tyner?

A. No, sir.

Q. You did not?

The COURT. There was no boss around?

A. Well, he was the only one. A man would naturally
97 think he would be boss. If you haul coal, you would naturally take orders from him.

By Mr. FISHER:

Q. Were there any consequences not following orders?

A. Maybe you get the wrong coal, and have to load it up again.

Q. Did you get any orders from the yard foreman?

A. Very seldom.

Q. What were those orders when you got them?

A. Well, just to what certain bin to get coal out of.

Q. Did you follow his directions?

A. Sometimes.

Q. You mean you disobeyed orders sometimes?

A. Sometimes.

Q. What happened?

A. Well, not very much of anything.

Q. Was anyone ever discharged while you were there?

A. Not as long as I know of, to my knowledge.

Q. Did you know of any man being dropped while you were there?

A. Well, I know of several men being quit, if that is what you mean?

Q. Discharged?

A. Well, just weeded out, to come right out and weed them out I didn't.

Q. I didn't understand you.

A. (Continuing.) Ones that he come right out and laid off, no, although there was a good many of them quit.

Q. Do you know why some of them quit?

A. Not exactly.

Q. What is it?

A. Not exactly.

Q. Well, do you know generally?

The COURT. If you don't, there is no use asking.

Mr. GLENN. Don't give anything he said.

The COURT. You are getting him to speculate, and we don't permit that. If he doesn't know, he doesn't know.

Mr. FISHER. That is all.

Mr. GLENN. No questions.

98 CARL WALL, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. KING:

Q. Mr. Wall, how long did you work for Mr. Albert Silk?

Mr. GLENN. Object to the form of the question. There is an inference there.

By Mr. KING:

Q. All right, how long were you employed?

The COURT. Did you ever work for Mr. Silk?

A. Yes, sir.

The COURT. How long?

A. Oh, about twelve or thirteen years.

By Mr. KING:

Q. About twelve or thirteen years. Are you working there now?

A. Well, part time.

Q. Part time. You worked for him during the years 1936 to 1940?

A. Yes, sir.

Q. In what capacity?

A. Not 1940, but 1939. I pulled off there I think in early 1940.

Q. Were you a truck driver or an unloader?

A. I was a truck driver.

Q. Truck driver?

A. Yes, sir.

Q. Did you ever work as an unloader down there, Mr. Wall?

A. I have.

Q. What period of time were you an unloader?

A. Oh, when I first started there. I don't know, but four years or five years in the yard I guess.

Q. Were you an unloader during 1936 and 1937?

A. No, sir.

Q. You were a truck driver then?

A. Yes, sir.

99 Q. How did you first start to work there, Mr. Wall?

A. Well, Dad worked there and I went down there and helped them unload coal.

Q. Your dad worked there?

A. Yes, sir.

Q. Is he here now?

A. He is our yard foreman.

Q. How long has he worked there?

A. About twenty or twenty-one years.

Q. Did you carry any signs with Silk Coal Company's name on them?

A. Yes, sir.

Q. What year did you carry those signs?

A. Oh, somewhere around 1936 to 1937. I just carried them a couple of short seasons.

Q. How did you get the signs?

A. Oh, I asked the yard foreman what them signs was there for and if I could use them; and he said yes, to take them; and I took them and put them on.

Q. Do you know if Mr. Silk had the signs made?

A. I think he did. I don't know.

Mr. GLENN. If he does not know, I ask that the answer be stricken.

The COURT. Strike it out.

By Mr. KING:

Q. Mr. Wall, have you ever been called down by Mr. Silk for the manner in which you have made a delivery of coal or something you have done at the customer's house?

A. Well, I think I dirtied one place up there once, and he asked if I was the cause of it is all.

Q. Did you go back and clean it up?

A. No, sir.

Q. Have you ever gone back? Has Mr. Silk ever asked you to go back and clean up somebody else's job?

A. Yes, sir: he has asked me if I would.

Q. Did you?

A. Yes, sir.

Q. Were you paid for it?

A. Yes, sir.

100 Q. Did you report pretty regularly during this period of time?

A. Yes, sir.

Q. Were you required to report any particular time of day?

A. No, sir.

Q. Could you leave at any time? I will withdraw that. Did you usually notify Mr. Silk or Mr. Taylor in the office if you desired to leave?

A. I generally did, but lots of times I did not. My dad was over there.

Q. Sometimes you have gone away without notifying them?

A. Yes, sir.

Q. Have you ever attempted to leave and were asked to remain and work?

A. No, sir; I have not.

The COURT. What was that last question?

(Last question and answer read by the reporter.)

Q. Is that right, Mr. Wall?

A. That is right.

Q. What were your average earnings, Mr. Wall, during September to April of the years 1936 to 1939?

A. Well, I had a small truck down there and I averaged right around about twenty-five dollars a week.

Q. Twenty-five dollars a week?

A. Yes, sir.

Q. From the Silk Coal Company?

A. Yes, sir.

Q. Did you haul for other people at that time?

A. Yes; I found me a couple of dollars a month extra.

Q. Have you ever damaged any property when you were making any deliveries?

Mr. GLENN. For whom?

Q. For Mr. Silk. I mean when you were making any deliveries of coal from the Silk Coal Company. Did you ever damage any property?

A. Oh, I broke windows and in fact tore down one clothesline, I think.

101 Q. Did you pay for the damage?

A. No; I fixed the clothesline up myself.

Q. Any other damages; who paid for them?

A. Well, the window lights, I guess the insurance company or Albert or somebody.

Q. You did not pay for them yourself?

A. No, sir.

Q. Did Mr. Silk ever make any remarks to you about the fact that you could not drink and stay on the job down there, Mr. Wall?

The COURT. What has that got to do with this?

Mr. KING. I think if the Court will permit, it is this, I think it will show where it does have something to do.

The COURT. That wouldn't show employment, the fact that he enforced the rule of sobriety. I think it would be a good rule if he did do that.

Mr. KING. I do, too.

The COURT. I don't think it sheds any light on the relationship of employer and employee, what their relationship is, the fact he doesn't have men around who drink.

Mr. KING. I think I can get to it in a different way if the Court please.

The COURT. All right.

By Mr. KING:

Q. Mr. Wall, did any men quit while you were working down there?

A. Yes.

Q. Do you know the reason for their quitting; was because they were not getting proper kind of hauls?

A. I suppose they quit because they wasn't making enough.

Q. Do you know?

Mr. GLENN. He said he supposed.

Q. Do you know? Answer yes or no.

Mr. GLENN. That is of his own knowledge?

Mr. KING. That is right.

The COURT. Do you know of any particular men there
102 who quit because they were not earning enough money, and that is the reason. Do you actually know of any man, Bill Henry, John Smith, or anybody making an excuse that he gave to another trucker or gave it to Mr. Silk?

Mr. GLENN. I can't see where it would be material.

A. Yes; I think one or two.

By Mr. KING:

Q. What was the per ton price that you had been paid for making deliveries when you first went to work for Mr. Silk?

Mr. GLENN. I object to the question, too far back, too remote.

Q. During the years in question, 1936, what was your standard?

A. I was getting seventy-five cents.

Q. Seventy-five cents per what?

A. Seventy-five cents per ton.

Q. Are you making more now?

A. No; I am not working, only part time.

Q. Do you know what the rate of pay is now?

The COURT. Mr. Silk is the one to ask that.

The WITNESS. Well, the time I unloaded a car of coal I got twenty-five cents a ton for it.

Q. You did not work as an unloader during the years 1936 to 1940?

A. No, sir.

Mr. KING. That is all.

Mr. GLENN. That is all. If you reported that you were going to be gone awhile, that was because you were supposed to report, or was it just voluntary on your part?

A. Just on my own part.

Mr. GLENN. There was no requirement that you do that?

A. No, sir.

Mr. GLENN. That is all.

The COURT. Step down.

103 Mr. KING. If the Court please, that is all of our other witnesses outside of two that I have not yet had an opportunity to talk to; it might save time if we would have about a five- or ten-minute recess here. I don't want to put on any others if they will all be cumulative here.

The COURT. You haven't made any case here yet.

Mr. KING. We will see what we can do about it. There are a couple of things that are not just exactly they way I thought it would go.

The COURT. This is an ideal relationship. It seems to me the government should leave it alone. It should not attempt to interfere or stir up trouble between the employer and employee.

Mr. KING. I don't think there is any trouble existing.

The COURT. It might result in it.

Mr. KING. Oh yes; it might result in it.

The COURT. Is this a suit to recover unemployment tax?

Mr. KING. Yes; suit to recover tax paid.

The COURT. But the tax has to be paid whether these men are employees or not. If Mr. Silk does not pay it then they will have to pay it themselves?

Mr. KING. No; they do not have to pay any tax under Title 9, under the Social Security or the Federal Security Contribution Act, and there are no benefits; no.

The COURT. They don't want to. Why not leave them alone?

Mr. KING. The only thing I can say, I would like to talk to about two more witnesses.

(Whereupon a recess was taken at the conclusion of which the following proceedings were had:)

Mr. KING. If the court please, the other witnesses we would introduce would testify about the same as the witnesses we have

already introduced, so I don't believe it is necessary to put
104 on any more witnesses than what has already been put in for the record. We would like to argue the case to the Court for a few minutes, as I said.

Mr. GLENN. We understand that all the evidence is in?

Mr. KING. That is right.

The COURT. Both sides rest?

Mr. KING. Yes.

Mr. GLENN. That is right.

Mr. KING. If the Court please, you will want to hear from both of us on the argument right now, in the usual procedure?

The COURT. The plaintiff should argue first, and then the defendant.

Mr. KING. All right.

(Whereupon counsel for the respective parties made their arguments to the Court at the conclusion of which the Court made the following statement:)

Statement by the Court

The COURT. This is a suit brought by Albert Silk, doing business as The Albert Silk Coal Company, to recover certain taxes heretofore paid to the Collector of Internal Revenue at Wichita, Kansas, on the theory that they were due under the Social Security Law for the years, part of 1936, 1937, 1938, 1939, and the first part of 1940. He contends that he was not liable for these taxes, and they were unduly assessed; that he was forced to pay them, and he brings this under the usual statutory provision for recovery.

The factual situation disclosed by this evidence is that Mr. Silk runs a coal yard here in Topeka, Kansas, and sells coal to people in that town at retail. He owns a piece of property on which there is certain equipment consisting of coal bins and tracks where rail-road cars full of coal are spotted, and also two office buildings opposite each other and between which there evidently is a drive-
105 way to the coal scales thereon. One of these rooms he uses for an office where he keeps his books and his employees, the bookkeeper and foreman are, and on the other side of this driveway, the other building is used for the truckers, so-called; that is, the people who take the orders that come in to him for coal, and get the coal in the yard thereby and deliver it.

The procedure seems to be as follows: The telephone call comes in to Mr. Silk, and he takes down the information, the address, and the amount of coal and makes out a ticket, a duplicate ticket, and then he rings a bell. This bell rings on the other side in the other room where these truckers are. These truckers consist of a number of independent men each of whom own their own

truck, which they have bought and paid for themselves, men who buy their gasoline, their own tires and oil, and own entirely the entire equipment of each truck which consists of the articles I have enumerated. They also have their own shovels, their own forks and wheelbarrows for delivering coal. Apparently they get most of their hauling business from Mr. Silk. But the evidence discloses that in addition to this they do hauling for outside parties when they have the time; they hold no relationship of employer and employee with Mr. Silk; that they just simply sit around there on the chance that they will get an order to deliver coal for him. When he rings the bell the first trucker whose name is on the top of the list or board that the boys voluntarily maintain in their room, their names come up in turn, answers the bell and gets the order for coal. The order he receives from Mr. Silk or his clerk is simply a statement of the amount of coal, the kind of coal and where it is to be delivered and the price. He takes that slip and goes and gets his own truck which he drives and operates himself and goes to the proper bin in the yard and loads it himself with the particular type of coal that the order calls for. He then drives that truck to the address given, that is of the customer, where he delivers the coal, puts it into the cellar and cleans up the mess incident to the delivery of coal. He then either returns to the yard or goes home for the day.

106 According to the testimony of both the truckers and Mr. Silk he exercises no other control over them. They report for work at such hours as they wish, and they leave when they wish, and they come and go absolutely independent of any regulations, rules or contracts with Mr. Silk. In other words, they are independent contractors owning trucks who simply congregate at Mr. Silk's yard and take advantage of his facilities in the hope that they will get an opportunity to haul coal to his customers who telephone him for it. He pays them a uniform price per ton for delivering this coal, which he pays out of the price, he, Mr. Silk, receives from the customer. If the order is a C. O. D., he delivers, the truckers must collect the price and bring it into the office, but no time is specified when he shall pay the money over and according to the testimony of the men, they sometimes keep the money on hand a couple of days before making a settlement in the main office. He also has another class of employees called unloaders. These are men who come to the plant and unload coal from the freight cars into the bins or onto the ground as the case may be. It seems there are twenty-one different kinds of coal to be found on the premises. When a trucker gets an order, it may require him to go to twenty-one different places in the yard where the coal is found either in bins or in piles on the ground, and where he himself of his own efforts and by using an automatic

electric conveyor which Mr. Silk supplies, loads the coal into his truck and goes off with his order. There are no terms of employment. The men are not discharged or hired formally in any way as those terms are used in trade or in business, and the testimony is that these truckers come and go as they wish. If they want to leave early, they can do so, and they do so without the permission of the office. They generally come to work around seven o'clock in the morning because most orders come in early in the morning and they get more loads to haul if they are there early in the morning instead of waiting later in the day the way some of them do. Very often at the same time they haul for other people, hauling grain and foodstuffs, furniture and other material for citizens of the community, and all this without the authorization or
107 interference or control in any way of the plaintiff. The only time when a driver who is at the top of the board, so to speak, does not get the first order that comes in, is when a customer asks for a particular driver, and very often the evidence is that the first driver on the board does not get the order because the customer does not want him, or after the order is exhibited to the driver, the trucker, he for personal reasons of his own does not care to make that delivery and declines it. It is then given to the next man in order on the board.

It is quite clear from this recital of the facts which is undisputed and which, in fact, constitutes the testimony uncontradicted of witnesses called on both sides, that there is no relation of employer and employee between these men. Mr. Silk does not hire them. He does not fire them. He simply maintains an exchange or a place there where these truckers with their own equipment, truck and equipment, can come and obtain orders from him. There is some evidence that this custom obtains in other coal yards in Topeka, and the reason that Mr. Silk gets plenty of drivers is because he pays a higher rate for delivering coal than other competitors in the same market.

The Court therefore finds the issues in favor of the plaintiff and against the defendant, and asks the plaintiff to prepare the proper findings of fact and conclusions of law upon which an order for the plaintiff recovering to the plaintiff the amount prayed for will be decreed. Will you prepare an order and findings and conclusions of law?

Mr. GLENN. I will do that. Shall we forward it to you at Denver?

The COURT. At Denver.

Mr. KING. There is one thing I would like to call the Court's attention to on the findings.

The COURT. I haven't made any finding yet.

Mr. KING. Yes; I know, but did the Court rule on the unloaders here? Are all unloaders regardless of whether they work on a percentage basis in the unloading the coal, or if they work on an hourly basis, in and about the yard, are they all to be considered under the ruling the same?

108 THE COURT. The unloaders, it appears, come to the yard and if there is any coal to be unloaded they are assigned a railroad car to unload and put the coal in certain places. Mr. Silk likewise does not hire these men nor in no way controls their movements. They work as long as they wish, quit when they wish, and furnish their own equipment except that which is used in common with other unloaders on the platform. The same finding will be made as to them as with the truckers.

I, Florence E. Meisner, do hereby certify that I am the contract reporter for the United States District Attorney for the District of Kansas; that at the request of said District Attorney I reported the trial had in the above entitled case at Kansas City, Kansas, by writing the same in shorthand and afterwards transcribing my shorthand notes; that the foregoing 132 pages is a true and correct transcription of my shorthand notes of said trial.

FLORENCE E. MEISNER.

Dated at Topeka, Kansas, December 29, 1943.

Plaintiff's Exhibit No. 1

STIPULATION OF FACTS

1. Plaintiff is a citizen and resident of the State of Kansas, with his principal place of business at Topeka, Shawnee County, Kansas. Defendant is the United States of America.

2. The defendant determined that during the periods from January 1, 1936, to December 31, 1939, certain coal haulers and unloaders were employees of the plaintiff and thus assessed social security taxes and federal unemployment tax against the plaintiff. Plaintiff paid the tax to the Collector of Internal Revenue, Wichita, Kansas, and said Collector is not out of office.

3. On or about February 26, 1940, plaintiff filed with the
109 defendant a claim for refund for the taxes paid, as set forth in plaintiff's complaint herein at paragraph 5;

4. Subsequently said claims for refund were partially allowed by the defendant in the sum of $314.99, with accrued interest in the sum of $38.70, which sums were reimbursed to plaintiff. The defendant disallowed the remaining part of plaintiff's claim for refunds.

5. On or about January 24, 1944, the defendant reassessed taxes for the amount of $353.69, which had been refunded to plaintiff,

and on or about October 17, 1941, collected from plaintiff by means of a tax warrant the reassessment of $353.69, together with interest, penalties, and costs in the amount of $32.10, or a total of $385.79.

RALPH F. GLENN,
Attorney for Plaintiff.
HARLOW B. KING,
Assistant U. S. Attorney,
District of Kansas, Attorney for Defendant.

Filed in the District Court December 13, 1943.

[Clerk's certificate to foregoing transcript omitted in printing.]

110 In United States Circuit Court of Appeals,
Tenth Circuit

Order of submission

Seventy-fifth Day, November Term, Tuesday, March 26th, A. D. 1946. Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable WALTER A. HUXMAN.

This cause came on to be heard, Lester L. Gibson, Esquire, appearing for appellant, Ralph F. Glenn, Esquire, appearing for appellee.

On motion, appellee was granted leave to file twenty printed copies of his brief herein out of time, which was accordingly done.

On motion, appellant was granted leave to file four typewritten copies of a reply brief herein within ten days from this day.

Thereupon this cause was argued by counsel and was submitted to the court.

111 United States Circuit Court of Appeals, Tenth Circuit

No. 3214—November Term, 1945

UNITED STATES OF AMERICA, APPELLANT *v.* ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY, APPELLEE

Appeal from the District Court of the United States for the District of Kansas, First Division

Lester L. Gibson (Sewall Key, Acting Asst. Atty. Gen., J. Louis Monarch and John W. Fisher, Sp. Assts. to Atty. Gen., Randolph Carpenter, U. S. Atty., and Lester Luther, Asst. U. S. Atty., were with him on the brief) for Appellant.

Ralph F. Glenn (Oscar Raines, Wendell L. Garlinghouse and Warren W. Shaw were with him on the brief) for Appellee.

Before PHILLIPS, BRATTON, and HUXMAN, Circuit Judges.

Opinion.

April 19, 1946.

HUXMAN, Circuit Judge: delivered the opinion of the court.

This was an action brought under Titles VIII and IX of the Social Security Act, and Subchapters A and C of Chapter 9 of the Internal Revenue Code, for the recovery of employment taxes paid under protest. Plaintiff recovered, and the government has appealed. The only question presented by the appeal is
112 whether the truck drivers and coal unloaders in question were employees of Albert Silk, doing business as Albert Silk Coal Company. The court's findings of fact are supported by substantial evidence and are therefore binding upon us. The following is a synopsis of the court's findings:

Appellee is a retail coal dealer in Topeka, Kansas, doing business as Albert Silk Coal Company. He has a large and extensive retail coal business. He does not own any trucks or any other vehicle used for the purpose of delivering the coal he sells. He contracts with individual owners of trucks for the delivery of coal at an agreed price per ton. The delivery trucks do not bear appellee's name, telephone number, or any descriptive advertising matter relating to his business. He owns a parcel of land on which are located his coal bins and tracks where coal cars are spotted for unloading, and two office buildings between which is a driveway to the coal scales. Appellee uses one of these buildings for his office and makes the other available as an assembly place for the truckers. The truckers have arranged a call list or board in the building in which they assemble, on which they enter their names in the order in which they are entitled to respond to a call for the delivery of coal. This was done by themselves for their own convenience. Appellee had nothing to do with the arrangement of the board. When a call comes into the office for coal, a ticket is made in duplicate, with all necessary data thereon. Appellee or his assistant then rings a bell which rings a bell in the building used by the truckers. The trucker whose name is at the top of the list on the board answers the bell and is offered the opportunity to make the delivery. If he desires to make the delivery he gets the order, but if for any reason he desires not to make the delivery, he so informs appellee and rejects the order. He is under no duty to make the delivery. In that case, the man next on the board is entitled to make the delivery if he so desires. After a delivery is made, a trucker is free to go home or return to the yard for other deliveries as he desires. According to the testimony, appellee exercises no control over the truckers. They come and go as they please; they are not formally hired or discharged; they are paid for

whatever coal they deliver. They are paid for what they haul as they request, sometimes after each load, sometimes at the end
113 of the day, and sometimes at end of the week. Frequently they haul coal for other dealers, haul grain, foodstuff, furniture, wood, rock, or any other material for other merchants or for private citizens of the community. This is done without interference or control by appellee over them in any way. The truckers report for work at such hours as they may wish, leave when they wish, and come and go independently of any rules or regulations or contracts with appellee. If they do not want to haul coal, they do not report, or if they want to absent themselves for a week or two and then return, they do so. This in substance presents the relationship between appellee and the truckers.

In addition to the truckers, the status of another class of workers, the unloaders, is involved in the appeal. The unloaders are men who come to appellee's coal yard and unload coal from cars into the bins. If when they come, there is coal to unload they are assigned a car and the bin into which they are to put the coal. They furnish their own tools and are paid an agreed price per ton. They are not regular employees. They come and go as they please. They likewise work for others at times, without the knowledge or consent of appellee. The only direction given to the unloaders is as to the car assigned to them and the bin into which they are required to put the coal.

In order for the government to prevail, the trial court's findings of fact must compel the legal conclusion that the workers in question are employees within the purview of the Act. The Act in question is remedial in its scope and should be liberally construed to effectuate its remedial objectives. It may be conceded that the strict common law concept of employer and employee relationship is not the test for determining such relationship when it comes into question under the remedial provisions of the Act. In a sense, anyone who is engaged to do work for another for wages is an employee. He is employed to do work. But, in the same sense, an independent contractor likewise is employed or hired to do work. Article 205 of Regulation 90, promulgated under Title IX of the Social Security Act, defines employer and employee relationship as follows:

114 "However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.

That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed. It is sufficient if he has the right to do so."

Regulation 91 on the Social Security Act, issued by the Bureau of Internal Revenue in 1936, and which was in effect during the time involved herein, contains substantially the same provisions relating to the employer and employee relationship as those contained in Regulation 90.

In Jones v. Goodson, 121 F. 2d 176, we said that:

"In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor."

We also said that only a

"reasonable measure of direction and control over method and means of performing the service is a constituent element of the relationship of master and servant."

The relationship between appellee and the haulers and unloaders fails to measure up to any of the standards laid down in the Act, the regulations promulgated thereunder, or in our interpretation thereof in Jones v. Goodson, supra, and United States
115 of America v. The Wholesale Oil Co., Inc., decided March 15, 1946. In a legal sense, there is no employment. In effect all these laborers are itinerant workers. They come to work if, when, and where they please, and quit in like manner. They may work for one coal dealer today and report at another coal yard tomorrow, or they may haul grain, furniture, or any other commodity for any individual or firm. But even while they work for appellee they are not subject to his control as to the method or manner in which they are to do their work. The undisputed evidence is that the only supervision or control ever exercised or that could be exercised over the haulers was to give them the sales ticket if they were willing to take it, and let them deliver the coal. They were free to choose any route in going to or returning. They were not required even to take the coal for delivery.

We think that the relationship between appellee and the unloaders is not materially different from that between him and the haulers. In response to a question on cross-examination, appellee did testify that the unloaders did what his superintendent at the coal yard told them to do, but when considered in the light of all his testimony, all that this answer meant was that they unloaded the car assigned to them into the designated bin. Immediately after he gave the above answer, he was asked: "Wasn't he the yard

foreman who directed them in their duties?" to which he replied: "Oh, I don't think so. They were told what to unload, where to unload it. He supervised."

The undisputed facts fail to establish such reasonable measure of direction and control over the method and means of performing the services performed by these workers as is necessary to establish a legal relationship of employer and employee between appellee and the workers in question.

The decision of the trial court is therefore affirmed.

115 In United States Circuit Court of Appeals

Judgment

Eighty-ninth Day, November Term, Friday, April 19th, A. D. 1946. Before Honorable ORIE L. PHILLIPS, Honorable SAM G. BRATTON, and Honorable WALTER A. HUXMAN, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

On May 25, 1946, the mandate of the United States Circuit Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court.

117 [Clerk's certificate to foregoing transcript omitted in printing.]

118 Supreme Court of the United States

No. 312, October Term 1946

Order allowing certiorari.

Filed October 21, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Attorney General. File No. 51176. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 312. The United States of America, Petitioner vs. Albert Silk, Doing Business as Albert Silk Coal Company. Petition for writ of certiorari and exhibit thereto. Filed July 18, 1946. Term No. 312 O. T. 1946.

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No. —

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Tenth Circuit, entered in the above cause on April 19, 1946, affirming the decision of the District Court of the United States for the District of Kansas, First Division.

OPINIONS BELOW

The opinion of the District Court (Oral statement R. 104–108) is not reported. The opinion of the Circuit Court of Appeals (R. 110–113) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 19, 1946. (R. 113–114.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether certain persons when unloading coal from freight cars into the bins of the taxpayer, a retail coal dealer, were performing services as his employees within the meaning of Sections 811 (b) and 907 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended.

2. Whether certain other persons when engaged in hauling coal for the taxpayer were performing services as his employees within the meaning of Sections 811 (b) and 907 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 13–17.

STATEMENT

Respondent brought this action for refund of taxes levied and collected by the petitioner under Titles VIII and IX of the Social Security Act and subchapters A and C of Chapter 9 of the

Internal Revenue Code, for the years 1936 through 1939. The tax was levied with respect to amounts paid by respondent to certain persons known as "unloaders" who unloaded the respondent's coal from freight cars into his storage bins and "truckers" who later hauled the coal to the respondent's customers. The sole issue between the parties in the court below was whether or not these persons were engaged in performing the unloading and hauling services as employees of the respondent within the meaning of the taxing provisions. (R. 16–17.)

The facts are not in dispute.[1]

1. *The unloaders.*—Respondent is a retail coal dealer in Topeka, Kansas. He has a large and extensive retail coal business. The unloaders are men who come to respondent's coal yard and unload coal from railroad cars into the bins. If when they come there is coal to unload, they are assigned a car and told in what bin they are to put the coal. They furnish their own tools—shovels and sometimes picks (R. 84, 88)—and are paid an agreed price per ton. They come and go as they please. They likewise work for others at times, without knowledge or consent of respondent. The only unloader who testified, as respondent's witness, declared that he worked two-thirds of the time in the winter season as an unloader

[1] Except where otherwise indicated the facts are taken from the findings of the District Court (R. 7–12) and the opinion of the Circuit Court of Appeals (R. 110–112).

in respondent's yard (R. 90). Respondent testified that the unloaders did what the yard foreman "told them to do", that although he did not direct them in their duties, "he supervised" (R. 58). The court below interpreted this as meaning that he merely designated the car and the bin into which they were to unload.[2] Respondent testified that the men are told "not to break the coal more than they can help it" (R. 55).

2. *The truckers.*—Respondent does not own the trucks or other vehicles used for the purpose of delivering the coal he sells. He contracts with individual owners of trucks for the delivery of coal at an agreed price per ton. They provide their own equipment and supplies. He pays them, usually once a week, out of the price received from his customers. They make C. O. D. collections for him when requested (R. 41, 86).

The truckers assemble in a designated building on respondent's premises, and, by their own arrangement, answer in rotation calls from respondent when he receives an order to deliver coal. A trucker is not required to make any delivery; he may reject the order. If he accepts it he drives his truck to the proper bin in respondent's yard, loads the truck himself, and delivers the coal to the customer's bin. He fixes

[2] There is also testimony that unloaders worked under the direction of the yard foreman with respect to miscellaneous yard work such as screening and cleaning up the yard, where they were paid by the hour. (R. 59, 89–90.)

his own hours, can come and go as he pleases, and is not supervised in his activities. Customers' complaints as to deliveries are made to respondent, who tells the trucker (R. 48, 95). Respondent sends someone to clean up, when necessary, and pays for any damage (R. 48–49, 95–96).

The truckers also haul for other persons when they so desire. But during the winter season they usually stick to respondent (R. 52). Many of the same men would show up regularly day after day for years (R. 69, 80, 84, 94). Those who testified[*] all indicated that by far the largest portion of their income—in some instances practically all of it—was derived from working for respondent (R. 78–79, 84, 96, 100).

Upon the facts just summarized the District Court held that both the truckers and the coal unloaders were not employees of the respondent but, instead, were independent contractors, and that the remuneration which he paid to them for their services did not come within the scope of the taxing provisions of the Social Security Act and corresponding sections of the Internal Revenue Code. (R. 13, 104–108). The Circuit Court of Appeals affirmed (R. 110–113).

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in failing to hold that the persons in question were em-

[*] At the urging of the court the number of witnesses was limited in order to avoid cumulative testimony (R. 91, 103).

ployees of the respondent and that he was liable for the social security taxes in question.

2. The Circuit Court of Appeals erred in failing to look to the purposes of the Social Security Act and to consider the economic facts of the relationship in holding that the persons engaged in unloading and hauling coal for the respondent were not his employees within the meaning of the Act.

3. The Circuit Court of Appeals erred in failing to consider the simple and manual nature of the work being performed by the persons unloading and hauling coal and in applying a legal concept of the traditional employer-employee relationship so restrictive in its scope as to eliminate all employment except that performed under constant and detailed direction and control by the respondent.

REASONS FOR GRANTING THE WRIT

1. Insofar as the unloaders are concerned, the decision below squarely conflicts with the decision of the Court of Appeals for the District of Columbia in *Grace* v. *Magruder*, 148 F. 2d 679, certiorari denied October 8, 1945, October Term 1945, No. 102. The *Grace* case also involved the status under the Social Security Act of laborers who unloaded coal. In that case, as in this one, the laborers worked when they liked, without supervision, worked for other persons as well as the taxpayer, provided their own tools, and were

not required to accept particular jobs.[4] The only factual difference is that in the *Grace* case the laborers unloaded from the delivery truck into the customer's storage bin, whereas here the workers unload from the railroad car into the bin in the dealer-taxpayer's yard.[5] As has been pointed out, in the present case the unloader is assigned by respondent to a particular car and bin, an item of control not present in the *Grace* case. The unloader at the customer's establishment is obviously subject to less supervision and control than the unloader in the dealer's own yard. On the facts, if there is any difference at all, the unloaders in this case are more clearly employees than in the *Grace* case.

The decision in the *Grace* case that the unloaders, therein called "hustlers", are employees of the dealer is thus plainly inconsistent with the decision below here. The Court of Appeals for the District of Columbia, following *National La-*

[4] The facts of the *Grace* case were not fully set forth in the opinion of the Court of Appeals. They may be found, however, at pages 56–62 of the Record filed with this Court in *Grace* v. *Magruder*, No. 102, October 1945 Term, certiorari denied, October 8, 1945.

[5] In the *Grace* case the trial court had found that the taxpayer (148 F. 2d, at 682):

"* * * has no agreement with the hustlers reserving the right to supervise the work of storing or directing the manner in which they store the coal, and [2] that no supervision or control is exercised either by plaintiff or the customer over the storage of coal or over the man who does the work of storing, or over the time and manner in which the work is done. * * *"

bor Relations Board v. *Hearst Publications, Inc.*, 322 U. S. 111, and the decision of the Fourth Circuit in *United States* v. *Vogue, Inc.*, 145 F. 2d 609, reasoned that the test under the Social Security Act was not the "Common law rules as to distinctions between servants and independent contractors", but the objective of Congress in enacting Social Security legislation (148 F. 2d at 680–681). In the alternative the Court of Appeals held that even under the orthodox tort liability test, the unloaders were not independent contractors.

The court below in the instant case, although stating that the "strict common law concept * * * is not the test" (R. 112), proceeds to base its decision on the absence of what it regards as sufficient "direction and control over the method and means of performing the services performed" (R. 112–113).[6] Such a standard, we think, is indistinguishable from the so-called common law test which the court purported to reject. The decision in our view thus conflicts with *Grace* v. *Magruder* both with respect to whether the so-called common law approach is to be used in cases of this type and on the applicability of that test, if it is to be used, on identical facts.

We recognize that this Court has denied certiorari on other occasions, on which its attention

[6] *Glenn* v. *Beard*, 141 F. 2d 376 (C. C. A. 6), certiorari denied, 323 U. S. 724, rehearing denied, 324 U. S. 889; *Grace* v. *Magruder*, 148 F. 2d 679 (App. D. C.), certiorari denied October 8, 1945.

has been called both to the importance of a definitive ruling as to the test to be applied in determining that persons are employees subject to the Social Security Act, and to the fact that some circuit courts of appeals were following the rule of the *Hearst* case while others were applying the so-called "common law" rule. Inasmuch as none of those cases involved identical factual situations, each could be said to turn on its particular facts. Since the *Grace* case and the decision below are indistinguishable in their facts, that obstacle to certiorari does not exist here. In view of the conflict this is clearly an appropriate decision for this Court to review.

2. It does not seem necessary here to elaborate on the obvious importance of a decision as to whether the strict control (or "common law") test or one more consistent with the purposes of the statute shall apply under the Social Security Act. Where individuals are engaged to devote their manual labor to the business of another for wages, differences in the degree of supervision

---

[7] *United States* v. *Vogue, Inc.*, 145 F. 2d 609 (C. C. A. 4); *Grace* v. *Magruder*, *supra*. *Cf. Nevins, Inc.* v. *Rothensies*, 151 F. 2d 189 (C. C. A. 3) affirming *per curiam* 58 F. Supp. 460 (E. D. Pa.).

[8] *Glenn* v. *Beard*, *supra*; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51 (C. C. A.); *Texas Co.* v. *Higgins*, 118 F. 2d 636 (C. C. A. 2); *Deecy Products Co.* v. *Welch*, 124 F. 2d 592 (C. C. A. 1); *American Oil Co.* v. *Fly*, 135 F. 2d 191 (C. C. A. 5); *Jones* v. *Goodson*, 121 F. 2d 176 (C. C. A. 10); *cf. United States* v. *Aberdeen Aerie No. 24*, 148 F. 2d 655 (C. C. A. 9).

over them should not be controlling in passing on the question of employment for purposes of a statute having as its end economic protection in old age and in periods of unemployment. A factor of much greater consequence should be a worker's economic dependence upon the employer. To hold that unskilled laborers, whose work is not supervised because it is too simple to require supervision, are independent contractors[*] and accordingly not within the Social Security Act clearly frustrates the accomplishment of the objectives of that legislation. *Cf. National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111.

The divergence in approach among the circuit courts of appeals emphasizes the desirability and importance of an authoritative disposition of the question.

3. We also urge that if the Court is of the view that the question as to the status of the unloaders should be reviewed for the reasons set out above, the status of the truckers also be considered in order that the whole case may be disposed of in accordance with what this Court decides to be the correct test. The primary difference between the truckers and the unloaders is that the former own

[*] See Restatement of the Law of Agency, Sec. 220, p. 486 (subsection 2, comment e) in which it is stated: "Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost conclusively a servant in spite of the fact that he may nominally contract to do a specified job for a specified price".

equipment of substantial value, their trucks.[10] In other respects their work of loading the trucks, driving them to the customer's establishment and unloading them is not substantially different. Although the truckers do not have to undertake particular jobs, once they accept a job their work is of the sort customarily performed by employees, and in fact many of them work steadily for respondent and derive the major portion of their income from such work (see p. 5, *infra*). If, as the *Hearst* decision holds, the word "employee" should be construed in accordance with the objectives of the statute in which it is found, persons who perform such work for another should be covered by the Social Security Act.

The employment arrangement with respect to the truckers is not a novel one. It is fairly typical of innumerable others which have been worked out by employers to meet the peculiar exigencies of their businesses. These arrangements fall

[10] In a number of cases this has been held not to preclude truck owners from being employees. *Bedford Pulp & Paper Co.* v. *Early*, decided April 6, 1944, D. C. E. D. Va. (1 P-H Social Security Tax Service, par. 36,316); *Grand Rapids Gravel Co.* v. *United States*, decided March 30, 1943, D. C. W. D. Mich. (1 P-H Social Security Tax Service, par. 36,247); *Perkins Bros., Inc.* v. *Birmingham*, decided October 19, 1944, D. C. N. D. Iowa (1 P-H Social Security Tax Service, par. 36,347); *Willard Sugar Co.* v. *Gantsch*, 59 F. Supp. 82 (N. D. Ohio); *Matter of Hiner*, decided September 2, 1941, D. C. S. D. Ind., (1 P-H Social Security Tax Service, par. 36,133); *Industrial Com.* v. *Bonfils*, 78 Colo. 306; *Fox Park Timber Co.* v. *Baker*, 53 Wyo. 467.

within a twilight zone between those relationships which are unequivocally employment and those which are clearly entrepreneurial. They partake, in part, of the nature of both, but are truly representative of neither. A decision by this Court as to the truckers will greatly aid in clarifying the application of the Act to the cases of this group.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

JULY 1946.

APPENDIX

Social Security Act, c. 531, 49 Stat. 620:

TITLE VIII—*Taxes With Respect To Employment*

* * * * *

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date: * * *

(42 U. S. C. 1940 ed., Sec. 1001.)

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

(42 U. S. C. 1940 ed., Sec. 1002.)

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date: * * *

(42 U. S. C. 1940 ed., Sec. 1004.)

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment; including the cash value of all remuneration paid in any medium other than cash; * * *

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer [with exceptions not herein relevant] * * *.

(42 U. S. C. 1940 ed., Sec. 1011.)

TITLE IX—*Tax On Employers of Eight Or More*

* * * * * * *

SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year: * * *

(42 U. S. C. 1940 ed., Sec. 1101.)

SEC. 907. When used in this title—

* * * * * * *

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer [with exceptions not herein relevant] * * * (42 U. S. C. 1940 ed., Sec. 1107.)

Sections 1400, 1401 (a) (b), 1410, 1426 (a) (b), 1600 and 1607 (b) (c) of the Internal Revenue

Code, in so far as pertinent here, are substantially the same as Sections 801, 802 (a), 804, 811 (a) (b), 901, and 907 (b) (c) set out above.

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

> ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.
>
> The words "employ", "employer", and "employee", as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.
>
> Whether the relationship of employer and employee exists, will in doubtful cases be determined upon an examination of the particular facts of each case.
>
> Generally the relationship exists when the person for whom services are performed has the right to control and direct the in-

dividual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists,

veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

* * * * *

ARTICLE 3, Treasury Regulations 91, promulgated under Title VIII of the Social Security Act, in so far as pertinent here, is substantially the same as Article 205 of Treasury Regulations 90 set out above.

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No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 312

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (oral statement R. 84–87) is not reported. The opinion of the Circuit Court of Appeals (R. 89–92) is reported at 155 F. 2d 356.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 19, 1946 (R. 92). The petition for a writ of certiorari was filed on July 18, 1946, and granted October 21, 1946 (R. 92). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether certain persons when unloading coal from freight cars into the bins of the taxpayer, a retail coal dealer, were performing services as his employees within the meaning of Sections 811 (b) and 907 (c) of the Social Security Act and Sections 1426 (b) and 1607 (c) of the Internal Revenue Code, as amended.

2. Whether certain other persons when engaged in hauling coal for the taxpayer were performing services as his employees within the meaning of Section 811 (b) and 907 (c) of the Social Security Act and Sections 426 (b) and 1607 (c) of the Internal Revenue Code, as amended.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set forth in the Appendix, *infra*, pp. 61–65.

STATEMENT

Respondent is a retail coal dealer in Topeka, Kansas, with a large and extensive retail coal business. Respondent brought this action for refund of taxes levied and collected by the petitioner under Titles VIII and IX of the Social Security Act and subchapters A and C of Chapter 9 of the Internal Revenue Code, for the years 1936 through 1939. The tax was levied with respect to amounts paid by respondent to certain persons known as "unloaders" who unloaded the respondent's coal from freight cars into his

storage bins and "truckers" who later hauled the coal to the respondent's customers. The sole issue between the parties in the court below was whether or not these persons were engaged in performing the unloading and hauling services as employees of the respondent within the taxing provisions (R. 13–14).

The facts are not in dispute.[1]

The unloaders.—The evidence as to the unloaders is very brief; it consists of the testimony of respondent himself (R. 43–44, 46–47), of one of the unloaders (R. 70–73), and of a former assistant of respondent (R. 55), all of whom testified as witnesses for respondent. The unloaders fixed their own hours and worked when they pleased (R. 44, 71). The unloader who testified stated that during the winter season he worked for respondent "about two-thirds of the time unloading, and the rest of the time would be

[1] The findings (R. 6–9) as to facts, as distinguished from conclusions, are in the main—though not entirely—accurate so far as they go. But as is not uncommon with respect to findings prepared by counsel (R. 86), the findings omit many of the undisputed facts which might lead to a different conclusion. Inasmuch as the facts in the short record are not disputed, it seems appropriate in the circumstances to base this statement upon evidence; *Sun Insurance Office, Ltd.* v. *Re-Mac Transport Co.*, 132 F. 2d 535 (C. C. A. 8); *Carter Oil Co.* v. *McQuigg*, 112 F. 2d 275, 279 (C. C. A. 7); *United States* v. *Mitchell*, 104 F. 2d 343, 346 (C. C. A. 8); *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 F. 2d 704 (C. C. A. 3); *State Farm Mutual Auto Insurance Co.* v. *Bonacci*, 111 F. 2d 412, 414–415 (C. C. A. 8).

part time in the yard when I felt like working" (R. 72).[2] Respondent testified that a lot of the men were floaters, and that some have unloaded for different yards (R. 44). Unloaders were paid by the ton, except when a car was hard to unload, in which case they were paid by the hour (R. 43, 73). Payment was on Saturday night for the week, although when needed the amount could be drawn during the week (R. 71). The workman provided his own shovel and pick (R. 71).

Respondent testified that the yard foreman told the men "what to unload, where to unload it. He supervised." (R. 46), that the men "did what he told them to do" (R. 46), although he did not direct them in their duties (R. 46), that the men were only instructed "to unload the cars and where to throw" the coal, to "haul the coal, and unload it" at a certain place, and "not to break the coal more than they can help it" (R. 44). Respondent's former bookkeeper and assistant testified that "the only instructions I know was to put the coal at a certain place and to unload it as quickly as possible" (R. 55).

The truckers.—The persons who deliver respondent's coal own their own trucks, and provide their own supplies and other equipment (R. 21),

[2] The latter reference is to miscellaneous screening and cleaning up in the yard which respondent apparently does not claim to be work exempt from the Social Security Act (R. 47).

except that respondent provides chutes in the small proportion of cases where they are needed (R. 29). They are paid by the ton out of the price received by respondent from his customers (R. 21.) They are paid weekly, but could and frequently did draw in between times (R. 40, 51). Respondent requires that the trucks be insured, pays the premiums, and deducts 5¢ a ton for the premiums paid up to the amount of the premiums (R. 40). The truckers make C. O. D. deliveries when requested, collecting the amount due for respondent (R. 33).

The truckers fix their own hours and come and go when they please (R. 24). There is no written contract with them (R. 24), and they are not given "written instructions" by respondent (R. 29). They are free to, and on occasion do, work for others, including other coal dealers (R. 25, 53). But the evidence is clear that a number of truckers, including all those who testified,[3] work regularly for respondent and obtain the major portion of their income from working for him.

Respondent himself testified that the truckers "usually stick" to him during the winter season, that "they hauled most of them for us, and they didn't haul for others, because we pay more, because our scale is higher than any yard in

[3] The trial judge indicated that he did not wish to have cumulative testimony (R. 66, 73), and respondent indicated that other witnesses would give the same kind of testimony (R. 73).

town" (R. 42). Respondent's assistant admitted that "the same men would show up day after day for a long period over a period of years" (R. 56). Four truckers testified, two for respondent and two for petitioner. The first stated that during the coal season he averaged $150 per month from respondent and $25 from other sources, and that he appeared "pretty regular, as regular as any man is when he has to eat" (R. 64). The second declared that he received about $30 a week from respondent, and from $3–$4 to $15–$20 from outside sources, "and that didn't happen every week" (R. 67–68). He reported pretty regularly at 7 o'clock in the morning (R. 68). The third testified that he "made practically all of [his] income * * * from Mr. Silk" (R. 78), and that he and half a dozen of the men were "regulars", some "coming there through a period of years" (R. 76). The fourth stated that his average earnings from Mr. Silk were $25 a week, and from other people "a couple dollars a month extra" (R. 81), that he had worked for Mr. Silk "about 12 or 13 years" (R. 79), and that he reported "pretty regularly during this period of time" (R. 81).

Respondent testified that about 50 to 100 truckloads of coal were sent out each day (R. 36–37) and stated that there were eight truckers presently on the list (R. 31). Other estimates were around 10 to 12 truckers, with a maximum of 24 (R. 76). (Cf. R. 56.) From this it would appear that each

trucker averaged a number of deliveries per day for respondent.

Although not required to do so, the truckers usually arrive at respondent's place of business early in the morning (R. 49–50, 60, 68, 75). They assemble in a designated building on respondent's premises which they use as their headquarters, and, by their own arrangement, answer in rotation calls from respondent when he receives an order to deliver coal (R. 24, 33, 50). Respondent gives the truckers a ticket stating the name and address of the customer, the type of coal, the amount, whether the coal is to be sprayed before delivery, the time the customer wants it (if the customer has specified), whether the coal is to be stacked at place of delivery, the kind of chute the trucker is to take with him, the price charged, and if the trucker is to collect it (R. 33–34, 50). The trucker has the privilege of not making a delivery; if he rejects the order the next in turn is called (R. 25, 50). Sometimes the customer would or would not want a particular trucker (R. 75–76).

If the trucker accepts the delivery he drives the truck to the proper bin at the respondent's yard (R. 7). He loads it either by hand or an electric conveyor which the respondent provides free of charge (R. 47). He then drives the truck to the address of the customer, unloads the coal and puts it in the customer's bin (R. 7). He is not supervised in these activities. He is not required to

return to the yard after delivery, and may or may not do so (R. 26):

When customers have a complaint that the trucker has not cleaned up properly or has damaged property they notify the respondent who tells the trucker (R. 38–39). If necessary respondent sends someone from the yard to clean up and pays for any damage without charging the trucker (R. 39). One of the truckers testified that he was "sent back" by Mr. Silk to clean up (R. 77). Another stated that Mr. Silk requested him to clean up someone else's job, and paid him for it (R. 80). When truckers broke windows Mr. Silk would pay the customer without charging the trucker (R. 77, 81).

During most of the period in question the truckers did not carry the name or insignia of respondent on their trucks. All four truckers testified that respondent had signs available for the trucks in 1936 or 1937, and that they carried them for a short time, although respondent did not ask them to do so (R. 64–65, 68, 77, 80).[4] The truckers furnish at their own expense any help they might need (R. 22, 55).

[4] The trial court's finding (R. 6) that the trucks did not bear any insignia of respondent apparently overlooked the uniform testimony to the contrary of all the truckers who testified. The years 1936–1937 are among the tax years involved in this case. Mr. Silk had testified that he could not recall having the signs made except that it was years back (R. 26, 37).

Upon the facts just summarized the district court held that both the truckers and the coal unloaders were not employees of the respondent but, instead, were independent contractors, and that the remuneration which he paid to them for their services did not come within the scope of the taxing provisions of the Social Security Act and corresponding sections of the Internal Revenue Code. (R. 10–11, 84–87.) The Circuit Court of Appeals affirmed (R. 88–92).

SPECIFICATION OF ERRORS TO BE URGED

1. The Circuit Court of Appeals erred in failing to hold that the persons in question were employees of the respondent and that he was liable for the social security taxes in question.

2. The Circuit Court of Appeals erred in failing to look to the purposes of the Social Security Act and to consider the economic facts of the relationship in holding that the persons engaged in unloading and hauling coal for the respondent were not his employees within the meaning of the Act.

3. The Circuit Court of Appeals erred in failing to consider the simple and manual nature of the work being performed by the persons unloading and hauling coal and in applying a legal concept of the traditional employer-employee relationship so restrictive in its scope as to eliminate all employment except that performed under con-

stant and detailed direction and control by the respondent.

SUMMARY OF ARGUMENT

I

A: In *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, the Court held that the word "employee" "is not treated by Congress as a word of art having a definite meaning", that the common law tests are not to be "made exclusively controlling, without regard to the statute's purposes", and that that term "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship". There is no rational basis for believing that Congress intended the reference to employment in the Social Security Act to embody exclusively the common law definition developed for tort liability purposes more than in the contemporaneous National Labor Relations Act. The persons whom the Social Security Act was designed to protect are those dependent upon the business of another for their work and livelihood.

B. This does not mean that Congress had any wholly new concept in mind when it referred to the employment relationship in the Social Security Act. The workers who are dependent upon others are in general, and in vast majority, those classified as employees for tort and other purposes. But in determining where the line should be drawn, for tort and other purposes,

between the employee and the independent contractor there has been a wide area of doubt and disagreement in which courts arrive at their decisions by balancing various pertinent factors. Among these are "whether or not the one employed is engaged in a distinct occupation or business", and 'whether or not the work is a part of the regular business of the employer". Restatement of Agency, Sec. 220. When the object of the law is the protection of those who work as a part of and are economically dependent upon another's business, those factors which have most significance in relation to that objective should be stressed rather than those which may properly be emphasized when liability for injury is the issue. Furthermore, the dependence of the worker upon the employer which should bring the Social Security Act into play results from his subjection to the employer's economic control, and differs only in shading from the physical control, commonly referred to as of great weight in the tort cases. Many courts, even in tort cases, have found a real and effective power of control to exist when one man is dependent for his livelihood on working for another and the latter has the unfettered right to terminate the relationship at will. There would thus be little or no difference between the result reached under the common law as applied by a number of courts and that which we believe is required under the

Social Security Act interpreted in accordance with the principles of the *Hearst* case.

C. The administrative regulations defining the employment relationship refer both to the common law factors and to the independent nature of the business enterprise as matters to be considered. They do not obviate the necessity of exercising judgment in relation to the weight to be given the various factors, or justify disregard in borderline cases of the statute's objectives. The Social Security Board explicitly, and the Treasury through a broad interpretation of the right to control, have construed the regulations as reaching workers who are in fact subjected to the economic control of the employer. All doubts as to the meaning of the regulation should be resolved, as they have been by the administrative agencies, in favor of the result most consistent with the purposes of the statute.

D. The failure of Congress to adopt an amendment to the Social Security Act for the express purpose of subjecting to coverage salesmen who would not be employees under any definition of employee affords no reason for interpreting narrowly the law which was left unchanged.

II.

The unloaders and truckers here involved are respondent's employees even under a strict common law tort liability rule, as many decisions directly in point attest. But if this view should

not be accepted, these workers unquestionably fall within the borderline area in which the weight of the additional factor of their economic dependence upon and integral relation to the employer's business should be sufficient to shift the balance in favor of coverage. They are engaged in activities which are an essential part of respondent's business. They work steadily for respondent and are as dependent upon him as workers whose employee status is clear. They are subjected to as much control as is required by the nature of the work, and as would have been sufficient for the ordinary employee performing the same tasks. Since respondent could dispense with their services at any time and since they were dependent upon him for their livelihood, nothing further was necessary to bring them within respondent's control. Their work is unskilled, and in the case of the unloaders even menial. That the truckers were regarded as a part of respondent's enterprise is shown by the fact that he held himself responsible to customers for their conduct. The workers' freedom in respect to working hours was largely theoretical. They worked as steadily as ordinary employees. The fact that the truckers owned their own trucks does not prove that they are not employees.

The question whether on the undisputed facts the truckers and unloaders are employees is not a factual one within the meaning of the Rules of

Civil Procedure but one calling for the Court's conclusion of law as applied to the admitted facts. This Court is accordingly not bound by the findings of the courts below.

ARGUMENT

The Social Security Act, both in its tax and benefit provisions, is predicated upon the payment of "wages," defined to be "remuneration for employment." See pp. 61–62, *infra*. With exceptions not pertinent here, employment is defined as meaning "any service by an employee for an employer." See p. 62, *infra*. The questions in this case are (1) what is the proper test to be applied in determining what persons are employees within the scope of the Social Security Act and the corresponding provisions of the Internal Revenue Code, and (2) how that test should be applied to the facts of this case.

I

THE TEST TO BE APPLIED IN INTERPRETING EMPLOYMENT UNDER THE SOCIAL SECURITY ACT

The court below in this case stated in its opinion that the Social Security Act (R. 90):

> * * * is remedial in its scope and should be liberally construed to effectuate its remedial objectives. It may be conceded that the strict common-law concept of employer and employee relationship is not the test for determining such relation-

> ship when it comes into question under the remedial provisions of the Act. * * *

The remainder of the opinion, however, is concerned only with the extent of respondent's control over the details of the activities of the workers (R. 90–92). The court finally based its decision solely on the absence of what it regarded as a "reasonable measure of direction and control over the method and means of performing the services performed by these workers" (R. 92). In applying such a limited standard, we think the court not only treated the common law principles of master and servant as established in tort cases as exclusively controlling, but gave to them an interpretation even more restricted than the principles require.

This doctrine cannot be justified unless it is to be assumed that when Congress used the words "employment", "employer", and "employee", in the Social Security Act it necessarily must be thought to have intended that the words have the narrowest meaning given them at common law.

A. THE PRINCIPLES OF THE *Hearst* CASE ARE APPLICABLE UNDER THE SOCIAL SECURITY ACT

It is necessary to go no further than two recent decisions of this Court to demonstrate that Congress does not invariably use "employment" as a

* By the "common law" meaning we mean that employed in tort cases, including the related workmen's compensation cases.

word of art embodying a common law concept developed in tort cases. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111; *United States* v. *American Trucking Association*, 310 U. S. 534, 545.[6] The *Hearst* case involved a statute enacted by the same Congress one month before the Social Security Act,[7] and having equally broad, though different, social objectives. In that decision, which quoted from the *American Trucking* case, the Court stated that the word "employee" (322 U. S., at 124–125):

> "is not treated by Congress as a word of art having a definite meaning * * *." Rather "it takes color from its surroundings, * * * [in] the statute where it appears," *United States* v. *American Trucking Assns.*, 310 U. S. 534, 545, and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained."

In words equally applicable to the present case, the Court continued:

---

[6] See also Restatement of Agency, p. 486, wherein it is said: "Statutes have been passed in which the word 'servant' and 'agent' have been used. The meaning of these words in statutes varies. The context and purpose of the particular statute controls the meaning which is frequently not that which the same word bears in the Restatement of this Subject."

[7] The National Labor Relations Act became law on July 5, 1935, the Social Security Act on August 14, 1935. See 49 Stat. 449, 620.

* * * Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally "employment," by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.

It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. To do this would be merely to select some of the local, hair-line variations for nation-wide application and thus to reject others for coverage under the Act. That result hardly would be consistent with the statute's broad terms and purposes.

* * * * *

The *Hearst* decision makes it plain that the administration of such a statute is not to be "encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes. The consequences would be ultimately to defeat, in part at

least, the achievement of the statute's objectives. Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law." 322 U. S., at 125–126. The criterion in interpreting the general term "employee" and applying it to doubtful cases is "the mischief at which the Act is aimed". 322 U. S., at 126.

The problem raised by the *Hearst* case, the Court noted, arises from the fact that (322 U. S., at 126–127): "Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand."

The result is, the Court concluded (p. 127), in an analysis as applicable to the Social Security Act as to the National Labor Relations Act, that:

> Unless the common-law tests are to be imported and made exclusively controlling, without regard to the statute's purposes,

> it cannot be irrelevant that the particular workers in these cases are subject, as a matter of economic fact, to the evils the statute was designed to eradicate and that the remedies it affords are appropriate for preventing them or curing their harmful effects in the special situation. * * *

(322 U. S., at 128):

> * * * when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.

(322 U. S., at 129):

> That term, like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. "Where all the conditions of the relation require protection, protection ought to be given."

We have quoted at great length from the *Hearst* case because it is controlling on the major question presented here. We can conceive of no rational basis for believing that Congress in-

tended the reference to employment in the Social Security Act to embody a strict common law definition any more than in the contemporaneous National Labor Relations Act. Under the Social Security legislation, as fully as under the National Labor Relations Act, "it cannot be irrelevant" that the unloaders and the truckers involved in this case "are subject, as a matter of economic fact, to the evils the statute was designed to eradicate"; or that "the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation." Though the purposes of the two laws are not the same, they are sufficiently alike to require similar techniques in bounding the term "employee" as a yardstick of coverage.

The purposes of the plan for old age benefits and unemployment relief embodied in the Social Security Act needs no detailed exposition; they are apparent from the mere description, and have been fully set forth in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 586–589, and *Helvering* v. *Davis*, 301 U. S. 619, 641–644. Both portions of the statute were based upon the experience of the nation in a period of great unemployment when masses of workers could not find work and when permanent unemployment was the lot of a large proportion of the aged. *Ibid;* S. Rep. No. 628, 74th Cong., 1st sess., pp. 2–16; H. Rep. No. 615, 74th Cong., 1st sess., pp. 2–8, 14–16; Report

of the President's Committee on Economic Security (Gov't Printing Office, 1935).

The persons who are most subject to these misfortunes are those who find employment in the business of others, who are dependent upon others to hire them for their livelihood and who, as a class, are themselves helpless in good times to make provision for their needs in times of adversity. *Ibid. Ridge Country Club* v. *United States*, 135 F. 2d 718, 721 (C. C. A. 7). Those persons are in common parlance described as "employees". The vast majority of them are, of course, persons who would be treated as employees for tort liability, workmen's compensation, and other purposes, and it is not improper to regard them generally as persons whose work is controlled by the employer. But on the periphery are many persons whose physical work may not be controlled to any substantial extent, although they work for and are dependent on and are economically controlled by the employer to the same extent as those whose work is subject to control. Such persons would seem to fall within the class of "employees" for social security purposes irrespective of how they may be classified in a field of the law in no way related to the problems which Congress was endeavoring to solve.

The so-called "control test" in the form in which the court below has applied it may be peculiarly fitted to make more equitable the effect of the doctrine of *respondeat superior* where one

person, without fault, may have to answer for an injury done by another; but it bears no natural relationship to the economics of unemployment. Unemployment may occur just as readily where control has been relinquished to the employed because the work is so simple, because it is too technical, because the employer hopes to avoid the legal burdens of an employer, or for any other reason, as where the employer retained full control. And the evils Congress was endeavoring to stamp out are equally great in either case.

The fundamental justification for placing the burden of Social Security taxes on an employer lies in the fact that he is using the labor of others to his own profit and not in the fact that he may or may not choose to retain complete control over the means and manner of doing the work. This burden, like workmen's compensation, constitutes a part of the cost of doing business and Congress intended that it should be so treated. S. Rep. No. 628, *supra*, p. 12; H. Rep. No. 615, *supra*, pp. 8, 16. To draw distinctions between workers performing the same services in competitive businesses solely on the basis of "control" not only serves to exclude persons who are the objects of the Act's protection but places the employer who accepts the social responsibilities of his position under an economic handicap.

The recent decision of this Court in *Social Security Board* v. *Nierotko*, 327 U. S. 358, shows that the definitions in the Social Security Act

are to be liberally construed in the light of the statutory objectives. The Court there held that the phrase "wages"—that is, remuneration for "employment"—included payments to an employee as a result of a Labor Board back pay order during the period when he was idle after being wrongfully discharged for union activities—a period in which the employer could hardly have been held responsible for the workers' torts.

Although prior to the *Hearst* case the circuit courts of appeals had generally held common law principles to be controlling under the Social Security Act,[8] at least four circuits have since indicated that they believe the principles enunciated by this Court in the *Hearst* case equally applicable to the Social Security Act. Of particular importance in this connection is the following statement of Judge Parker for the Fourth Circuit in *United States* v. *Vogue, Inc.*, 145 F. 2d 609, 612, subsequently approved by the Court of Appeals for the District of Columbia in *Grace* v. *Magruder*, 148 F. 2d 679, 680–681, certiorari denied, 326 U. S. 720:

> Common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The Social Security Act, like the

[8] E.g., *Glenn* v. *Beard*, 141 F. 2d 376 (C. C. A. 6), certiorari denied, 323 U. S. 724; *Texas Co.* v. *Higgins*, 118 F. 2d 636 (C. C. A. 2); *Decoy Products Co.* v. *Welch*, 124 F. 2d 592 (C. C. A. 1); *American Oil Co.* v. *Fly*, 135 F. 2d 491 (C. C. A. 5); *Jones* v. *Goodson*, 121 F. 2d 176 (C. C. A. 10).

> Fair Labor Standards Act, 29 U. S. C. A. § 201 et seq., and the National Labor Relations Act, 29 U. S. C. A. § 151 et seq., was enacted pursuant to a public policy unknown to the common law; and its applicability is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability. * * *
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> The Social Security Act like the National Labor Relations Act does not define employees, and consequently what was said by the Supreme Court in *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 64 S. Ct. 851, 855, in holding that newsboys were employees within the meaning of the act is pertinent here. * * *
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> * * * * * *

See also *United States* v. *Aberdeen Aerie, No. 24*, 148 F. 2d 655, 658 (C. C. A. 9); *Nevins, Inc.* v. *Rothensies*, 151 F. 2d 189 (C. C. A. 3), affirming *per curiam* 58 F. Supp. 460 (E. D. Pa.). Several other circuits continue to apply the strict common law test, without adverting to or distinguishing the *Hearst* case. *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51, 53 (C. C. A. 6); *Greyvan Lines* v. *Harrison*, 156 F. 2d 412 (C. C. A. 7), pending on certiorari No. 673; *McGowan* v. *Lazeroff*, 148 F. 2d 512 (C. C. A. 2); *United States* v. *Wholesale Oil Co.*, 154 F. 2d 745 (C. C. A. 10). In the present case the Circuit Court of Appeals for the

Tenth Circuit seems to recognize the propriety of applying the *Hearst* ruling at one point in its opinion and to disregard it thereafter. In *Walling* v. *Rutherford Corp.*, 156 F. 2d 513, pending on certiorari No. 562, the Tenth Circuit has, however, given effect to the *Hearst* doctrine in applying the Fair Labor Standards Act.

The Social Security Board and the Federal Security Agency[9] have also recognized the necessity of defining the employment relationship in the light of the purposes of the statute rather than in common law tort liability terms. In *Matter of Ellis L. Vaughan*, Case No. 4–454, decided December 19, 1946, the Appeals Council[10] stated, citing the *Hearst* and *Vogue* decisions:

> * * * we wish to point out that a decision as to whether an individual is or is not an employee for the purposes of the Social Security Act, as amended, must be determined primarily from the history, terms, and purposes of that Act. The term "employee" is not a word of art having a definite meaning. The term must be construed in the light of the end to be attained by the enactment of the Social Security Act, as amended. The relationship of

[9] The Social Security Board was abolished and its functions transferred to the Federal Security Agency by Reorganization Plan No. 2 of 1946, effective July 16, 1946. H. Doc. 593, 79th Cong., 2d Sess.

[10] The Appeals Council is the final administrative arbiter in passing upon claims for benefit payments. Social Security Board, Regulations No. 3, 20 C. F. R., 1944 Supp., 403.710 (e).

employer and employee for the purposes of the social security program is broader than the narrow technical legal relation of "master and servant," as the common law has developed that relation in all its variations; and at the same time this relationship is narrower than the entire area of rendering service to others. *National Labor Relations Board* vs. *Hearst Publications, Incorporated*, 322 U. S. 111, 64 S. Ct. 851; *U. S.* vs. *The Vogue, Incorporated*, 145 F. (2d) 609 (C. C. A.).

The Social Security Act, as amended, is designed to replace a part of the wage lost through old age and premature death. The purpose of this Act is to afford protection to individuals who render services to others under certain circumstances that, as a matter of economic fact, they are exposed to the risk of such loss of wage income. The greater the degree of economic dependence of an individual upon a particular relationship, the more clearly do the purposes of the Act afford an index of coverage. If the termination of the arrangement under which the services are performed would render the worker unemployed in the ordinary sense of that term, generally the economic status of such worker is that of an employee.

B. THE RELATION BETWEEN THE TORT TEST AND THAT TO BE APPLIED UNDER THE SOCIAL SECURITY ACT

We have said that the common law or tort liability test is not to be regarded as decisive under

the Social Security Act and that the courts in interpreting "employment" should be guided to a large extent by the purposes of the statute in accordance with the doctrine of the *Hearst* case. A more precise statement of our position as to the proper test and its relation to the common law principles may be helpful.

The phrase "common law test" is used to describe the test commonly developed and applied in tort cases. It requires that the courts consider and weigh a number of familiar factors in determining the existence of an employment relationship. See Restatement of Agency, Section 220. It is not an automatic, self-applying standard nor one in which each factor receives a mathematically predeterminable amount of weight. The courts vary greatly in the application of these factors and in the results they reach. See *National Labor Relations Board* v. *Hearst Publications*, 322 U. S., at 121–122, and authorities cited; Asia, *Employment Relation: Common-Law Concept and Legislative Definition*, 55 Yale Law Journal 76 (1945).

The test which we conceive to be appropriate under the Social Security Act does not disregard these factors. Congress did not have any wholly new concept in mind when it referred to the employment relationship. But just as in tort cases some courts emphasize and give more weight to the factors they deem most significant for purposes of apportioning liability, so in this field it

is appropriate to stress the factors which are most significant in relation to economic security. It would thus be fitting to give primary weight to such elements of the relationship as "whether or not the one employed is engaged in a distinct occupation or business" and "whether or not the work is a part of the regular business of the employer". Restatement of Agency, Section 220 (2) (b), (h). Certainly they are more important for the purposes of this statute, and perhaps generally, than the method of payment, who supplies the tools and equipment, the skill required in the particular occupation. Cf. Restatement of Agency, Section 220 (2) (d), (e), (g).

There is even considerable diversity in tort cases as to the content of the so-called control factor, which is often thought to be predominant. Control is itself a factor which may be established by evidence of many kinds. If one man is dependent for his livelihood on working for another, and if the latter has the unfettered right to terminate the relationship, a real and effective power of control will ordinarily exist. In *Speculations as to "Respondeat Superior"* (Harvard Legal Essays (1934) 433, 458, n. 9), Professor Seavey concludes, "It is quite true that in most of the master and servant situations there is no physical control by the master, but the relationship ordinarily carries with it a power of control over the servant through his economic subjection * * *". Many courts have treated this as manifesting sufficient

control to establish the employment relationship. See cases cited *infra*, pp. 50–51.[11] "The absence

[11] "The power of the principal to discharge the employee at will or upon short notice has been given greater prominence by many courts than is indicated by the Restatement. *L. B. Price Mercantile Co.* v. *Industrial Comm.*, 43 Ariz. 257, 30 P. (2d) 491 (1934); *Press Publishing Co.* v. *Industrial Accident Comm.*, 190 Cal. 114, 210 Pac. 820 (1922); *N. Y. Indemnity Co.* v. *Industrial Accident Comm.*, 80 Cal. App. 713, 252 Pac. 775 (1927); *Industrial Comm.* v. *Hammond*, 77 Colo. 414, 236 Pac. 1006 (1925); *Industrial Comm.* v. *Bonfils*, 78 Colo. 306, 241 Pac. 735 (1925); *Aisenberg* v. *O. F. Adams Co.*, 97 Conn. 419, 111 Atl. 391 (1920); *Franklin Coal and Coke Co.* v. *Industrial Comm.*, 296 Ill. 329, 129 N. E. 811 (1921); *Clark's Case*, 124 Me. 47, 126 Atl. 18 (1924); *Matter of Glielmi* v. *Netherland Dairy Co.*, 254 N. Y. 60, 171 N. E. 906 (1930); *Journal Pub. Co.* v. *Unemployment Comp. Comm.*, 155 P. (2d) 570 (Ore. 1945); *Cockran* v. *Rice*, 26 S. D. 393, 128 N. W. 583 (1910). The following statement, from 14 RULING CASE LAW 72, is often quoted in the cases: 'The power of an employer to terminate the employment at any time is incompatible with the full control of the work which is usually enjoyed by an independent contractor, and hence is considered as a strong circumstance tending to show the subserviency of the employee. Indeed, it has been said that no single fact is more conclusive, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself.' Some courts have held it to be the most important of all factors. *L. B. Price Mercantile Co.* v. *Industrial Comm.*, 43 Ariz. 257, 30 P. (2d) 491 (1934); *Industrial Comm.* v. *Bonfils*, 78 Colo. 306, 241 Pac. 735 (1925). In the *Bonfils* case the court concluded: 'By virtue of its power to discharge, the company could at any moment direct the minutest detail and method of the work.' *Id.* at 308, 241 Pac. at 736. Perhaps in emphasizing the power of discharge the courts are really thinking of the economic dependence of the worker." Asia, *Employment Relation: Common Law Concept and Legislative Definition*, 55 Yale Law Journal, pp. 76, 79.

of a written agreement or contract of hiring only makes the employment more hazardous for the hustler and puts him more completely under appellant's control". *Grace* v. *Magruder,* 148 F. 2d 679, 682 (App. D. C.), certiorari denied, 326 U. S. 720. "If he does anything at variance with the will of his employer, its policy or preference, he knows that his contract of employment may be ended over night". *Glielmi* v. *Netherland Dairy Co.,* 254 N. Y. 60, 63 (per Cardozo, C. J.).

The control evidenced by the right to discharge at will would in itself mark the economic dependence which characterizes the persons whom Congress was seeking to protect in the Social Security Act. Those courts which have applied the control test with a realistic appreciation of the practical effects of such a relationship have tended to reach results not greatly different from those reached by application of the principles of the *Hearst* case. It does not matter to the worker whether his economic dependence on the person he works for is treated as establishing the latter's *de facto* control over him or is used more directly to show that he falls within the purposes of the Social Security legislation.

It thus becomes apparent that the approach which emphasizes the purposes of the statute will in substance result merely in the stressing of factors which are already given great weight by some of the common law courts. There would

indeed be little or no difference between the common law test, as applied by many—though probably not most—state courts in the light of economic realities and that which we think is derived from the words of the Social Security Act read in the light of its purposes. For the dependence of the worker upon the business of another which should bring the Social Security Act into play results from his subjection to the employer's economic control, a factor which differs only in shading from the physical control which may properly be emphasized when tort liability is the issue.

The test which we think should be applied may be summarized as follows:

In the borderland where a worker's status would be doubtful under the tort liability test the economic factors which are related to the purposes of the Act should be controlling rather than factors concerned with the physical performance of the work. And in some cases near the borderline, even where for tort purposes a worker would not be deemed an employee, the emphasis upon those factors which give rise to economic dependence or control might be enough to shift the balance.

Although in this brief and generally in dealing with this subject the "common law test" has been regarded as synonymous with that applicable to tort liability cases, this is not entirely fair to

the flexible processes of the common law.[12] Common law rules are developed in relation to the subject matter of the particular case. In tort cases the judges are properly concerned with the circumstances under which one man should be held financially liable for the misconduct of another. It does not follow that the test found appropriate for that purpose would even at common law be applied where different policy considerations point to a somewhat different rule. In the *Hearst* case this Court recognized that at common law the control test does not have the same significance in different contexts. See 322 U. S., at 120–121, *infra*, pp. 36–37.

Unless courts have now lost the power to mould common law to new situations,[13] there is no reason for assuming that a court guided by the philosophy and principles of the common law would deem the factors determining the existence of the employment relationship for tort liability pur-

[12] "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.

* * * * * *

"* * * and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms." *Hurtado* v. *California*, 110 U. S. 516, 530; *Funk* v. *United States*, 290 U. S. 371, 382–383.

[13] *Funk* v. *United States*, 290 U. S. 371, and the cases it cites show that the courts have not lost this power.

poses controlling when protection against unemployment and old age was the issue to be determined. A common law court facing the latter problem would be mindful of the analogy of the tort cases, but it would be careful to observe that in some respects the rules that the courts had fashioned for purposes of vicarious liability stressed some factors and ignored others in a manner not wise and reasonable when the object is security against unemployment. The court properly applying principles of the common law would adjust its formula to fit the problem at hand. This is precisely the proper function of a court in interpreting a statute, so as to apply it to "the mischief at which the Act is aimed" (*Hearst* case, 322 U. S., at 126). Our argument that the purpose of the Social Security Act must be taken into account and given great weight in applying the statute is not therefore in derogation of any common law test, but is in entire accord with true common law principles and common law technique.

Although for the above reasons we believe that there is no conflict between the tests called for by the common law and that required by the purposes of the Social Security Act, it is nevertheless true that a number of courts, such as the court below in this case, have applied only the tort liability doctrine very narrowly construed; they look in the main to who actually controls the details of the physical work. Such an approach is not, we submit, correct even under the common law. It

is our intention to show, however, that whether such a test or the rule we have advocated is the proper doctrine the result must be to hold the workers here involved employees within the meaning of the Social Security Act.

C. THE REGULATIONS

The court below and other lower courts adopting the tort-liability test have relied on the Treasury (and also Social Security Board) Regulations defining the employment relationship. Treasury Regulations 90, Article 205; Social Security Board, Regulation No. 3, 20 C. F. R. 1944 Supp. 403.804, Appendix, *infra*, pp. 63–65. We do not believe that the Regulations were intended to be or should be interpreted as embodying a test for the borderline situation differing from that indicated above.

The Regulations state that:

> *Generally*[14] the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. * * *

In addition, the "right to control", "the right to discharge", "the furnishing of the tools and the furnishing of a place to work" are mentioned as

[14] Italics in this brief are supplied.

factors to be considered. The description of the relationship and the method of compensation are stated to be immaterial if the employment relationship exists. It is further stated that:

> *In general* if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

The Regulation also proceeds to give illustrations of what it means by independent contractor, stating that:

> *Generally,* physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Although the first portion of the Regulation stresses the control factor, the introductory expressions "generally", and "in general" show that this portion of the statement is not all-inclusive but is merely a description of the typical employment relationship. Clearly most of the persons coming within the objectives of the Act will meet such a test. On the other hand, in defining the independent contractor "generally", emphasis is on professional persons and contractors having their own business and offering their

services to the public; such persons would not be within the Act's objective. The Regulation thus defines the typical employee and the typical independent contractor. Quite properly in these definitions the Regulation does not discard the well-established concepts known in other fields. But the definitions are qualified by the use of the terms "generally" and "in general"; and inevitably are not decisive in the "borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing." Cf. *Hearst* case, 322 U. S., at 121. The reason is that the great number of factual situations in the borderland defies any generalized formula for simple application. In doubtful cases it is always proper to look to the purposes of the statute, and to give most weight to those factors which will effectuate those objectives.

Since the Regulations indicate that both control and the independent nature of the business—each a factor of importance at common law—are to be considered, it is clear that they do not adopt the former as the exclusive test. Furthermore, "control" in itself is a nebulous concept, the content of which has varied with the subject to which it is being applied. This Court noted in the *Hearst* case that (322 U. S. 120–121 n):

> * * * even at the common law the control test and the complex of incidents evolved in applying it to distinguish an

> employee" from an "independent contractor," for purposes of vicarious liability in tort, did not necessarily have the same significance in other contexts * * *.

As we have already seen, a broad application of the common law tests leads to about the same results as an application of the *Hearst* case. For purposes of the Regulations, read in the light of the known object of the statute, control even over details may properly be inferred from the right to terminate a relationship at will, when coupled with the typical worker's dependence on his job. See pp. 28–30, *supra;* pp. 50–51, *infra.*

That the Regulations should not be given the restrictive construction placed upon them by respondent and the court below appears from the manner in which they have been administratively interpreted. The construction of an administrative regulation by the agency which issues it is, of course, entitled to the greatest weight. *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410. The Regulation here involved has been promulgated both by the Treasury and the Social Security Board, which until recently administered various portions of the Social Security Act. Both agencies have applied the Act to many persons, who, not being engaged in an independent business of their own, are from an economic standpoint dependent upon those for whom they are performing services, even though some courts applying

tort principles would not find such persons to be employees.

The Bureau of Internal Revenue reaches that result by liberally interpreting the concept of "control" in the Regulations. That the Bureau interprets its regulations as covering the types of persons involved in these cases is, of course, shown by the fact that it has attempted to collect Social Security taxes both from Mr. Silk and from the Greyvan Lines. The Bureau has repeatedly, in many cases,[15] taken the position that the employment relationship for social security purposes ex-

[15] The Bureau's position is shown by the facts appearing in reported Social Security tax decisions, inasmuch as no suit is brought unless the Bureau has decided that an employment relationship exists, and that a tax is due. Illustrative cases, apart from the cases at bar are: truck-owner-drivers (*United States* v. *Mutual Trucking Co.*, 141 F. 2d 653 (C. C. A. 6); *Willard Sugar Co.* v. *Gentsch*, 59 F. Supp. 82 (N. D. Ohio); *Bedford Pulp & Paper Co.* v. *Early*, decided April 6, 1944 (E. D. Va.), not reported, but may be found in P-H Soc. Sec. Tax Service, vol. 1, par. 36,010); taxi drivers leasing cabs from company (*Jones* v. *Goodson*, 121 F. 2d 176 (C. C. A. 10); *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324 (C. C. A. 4)); bulk oil distributors owning trucks (*Texas Co.* v. *Higgins*, 118 F. 2d 636 (C. C. A. 2); *American Oil Co.* v. *Fly*, 135 F. 2d 491 (C. C. A. 5); *Glenn* v. *Standard Oil Company*, 148 F. 2d 51 (C. C. A. 6); home workers (*Glenn* v. *Beard*, 141 F. 2d 376 (C. C. A. 6), certiorari denied, 323 U. S. 724); miners working under a leasing arrangement (*Anglin* v. *Empire Star Mines Co.*, 129 F. 2d 914 (C. C. A. 9)); outside salesmen (*McGowan* v. *Lazeroff*, 148 F. 2d 512 (C. C. A. 2)); *Stone* v. *United States*, 55 F. Supp. 230 (E. D. Pa.); *Pure Baking Co.* v. *Early*, decided April 24, 1943 (E. D. Va.), not reported but may be found in P-H Soc. Sec. Tax Serv., vol. 1, par. 36,005).

tends to situations within the borderland as to which there might have been doubt at common law. It can be of no significance in this case that the Bureau of Internal Revenue has verbalized its conclusions in terms of "control." As we have seen, the same facts that bring a relationship within the purposes of this legislation will commonly show that the worker is actually at the beck and call of the person he is working for, and is thus subject to control in a realistic sense. As one of the truckers testified in this case, he was "as regular as any man is when he has to eat." (R. 64.)

The Social Security Board has been even more explicit in interpreting the Regulations as consistent with the doctrine of the *Hearst* case. In *Matter of William Edward Stanly,* Case No. 12–338, decided January 4, 1945, the Appeals Council observed:

> By way of contrasting the situation where there is an employment relationship with one where none exists, the regulation designates as those who are *not* employees individuals "who follow an independent trade, business, or profession, in which they offer their services to the public." Thus, the regulation recognizes that the mere "control" by one person over another's activities, or his right to exercise such control, although strongly indicative of an employer-employee relationship between the parties, is not necessarily determinative thereof since if one person renders his

services for another in the furtherance of his own independently established business, he is not that other's employee. Equally implicit in the Board's regulation, on the other hand, is the principle that an individual who performs service for another person which furthers the latter's business enterprise is the latter's employee, unless it clearly appears that he does so as an incident to the pursuit of his own "independent trade, business, or profession."

The "control test" which is applied in tort cases in ascertaining whether an individual should be held responsible for damages caused to or by one performing services for him (on the theory that "control" of the activities enables him to minimize the possibility of an injury) relates principally to the extent of authority exercisable by the alleged employer over the alleged employee at the time when an injury was occasioned. In our opinion, such a test has no apparent relevance to the problem of identifying the "employee" whose wage loss, due either to old age or death, it is the purpose of a social insurance system to alleviate. The more significant matter to be determined would seem to be rather whether the individual in question is, or was, dependent upon the actions of another with respect to circumstances conditioning his opportunity to derive a livelihood from his personal efforts. In some situations such dependence may result from the same facts which indicate

> also the presence of "control," while in others there may be dependence without actual "control" or the right to exercise it.

The Appeals Council then went on to quote approvingly from the *Vogue* and *Hearst* cases. In reaching a result based in large part on the extent to which the workers' activities are independent of or a part of the employer's business, the Council was manifesting the view that such a standard was entirely consistent with the Regulations. This position of the Council, we are authorized to state, has met with the full approval of the Social Security Board and the Federal Security Administrator.

If there should be a question as to whether the Regulation permits the employment relationship to be construed in the light of the statutory purpose in borderline cases, one further established principle is pertinent. The Regulations are, of course, not conclusive. Cf. *Social Security Board* v. *Nierotko*, 327 U. S. 358. All doubts as to their meaning should be resolved in favor of the result most consistent with the well-known purposes of the Social Security Act, and accordingly in favor of the validity of the Regulations themselves. Both administrative agencies are construing the Regulations in such a manner, and there is no reason why the courts should not do so.

D. THE PROPOSED 1939 AMENDMENT

It has been suggested that the failure of Congress to enact a proposed amendment submitted

with the Social Security amendments of 1939, which would have enlarged the definition of "employee" specifically to include salesmen, indicates that the common law concept of the term is in accordance with the legislative intention. *American Oil Co.* v. *Fly*, 135 F. 2d 491 (C. C. A. 5); *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (C. C. A. 6). We think these courts have attached a wholly wrong significance to the amendment proposed in 1939 and to its rejection. What happened is simply that the House of Representatives adopted, but the Senate and ultimately the Congress rejected, a special rule of thumb for determining the coverage of salesmen.[16] In general, under the amendment, a salesman would have been covered if he was a servant at common law, and if not, would nevertheless have been covered unless he was a broker or factor selling on behalf

[16] "(6) The term 'employee' includes an officer of a corporation. It also includes any individual who, for remuneration (by way of commission or otherwise) under an agreement or agreements contemplating a series of similar transactions, secures applications or orders or otherwise personally performs services as a salesman for a person in furtherance of such person's trade or business (but who is not an employee of such person under the law of master and servant); unless (A) such services are performed as a part of such individual's business as a broker or factor and, in furtherance of such business as broker or factor, similar services are performed for other persons and one or more employees of such broker or factor perform a substantial part of such services, or (B) such services are casual services not in the course of such individual's principal trade, business, or occupation." H. R. 6635, 76th Congress, sec. 801 (b).

of more than one company and employing at least one assistant salesman in his brokerage or factoring business, or unless the selling was "casual service" not in the course of his principal occupation. The stated intention of the Ways and Means Committee was "to set up specific standards" so that salesmen "may be uniformly covered without the necessity of applying any of the usual tests." (H. Rep. No. 728, 76th Cong., 1st sess., p. 76.) The amendment was stricken by the Committee on Finance of the Senate in the belief that the existing law should continue to be limited to "employees" (S. Rep. 734, 76th Cong., 1st sess., p. 75 (1939–2 Cum. Bull. 565)), and the House receded (H. Conference Rep. No. 1461, 76th Cong., 1st sess., p. 14 (1939–2 Cum. Bull. 593)).

On any view this amendment would have changed the law, since no such rule of thumb can be found in any definition of employee, either under the "common law" tests or the *Hearst* case. As noted, it was for the express purpose of avoiding "the usual tests" that the amendment was proposed. Under the amendment, for example, a broker or a factor would have been covered, however many the companies for which he might be engaged in selling, provided only that he employed no assistant salesman. Neither economic dependence, control, nor any of the other usual criteria would have had any relevance, if the statutory conditions were met. A broker or factor who em-

ployed no assistant, even though he might be in every sense and for all other purposes an entrepreneur, would have been declared for this purpose automatically an "employee" of every company for which he was engaged in making sales. The rejection of an amendment which on any view would have changed the law affords no reason to interpret narrowly the law which was left unchanged.

It cannot be said that in 1939, Congress intended the limitation of coverage to employees to be narrowly construed, without regard for the purposes of the statute. That the mere use of the word "employee" does not manifest legislative approval of any such restrictive construction was held in the *Hearst* case, which shows that the concept of employee was sufficiently flexible even at common law to permit an interpretation in accordance with statutory objectives without departing from the "ordinary" meaning of the word. The series of cases applying the Social Security Act definition narrowly did not commence until 1941,[17] so that Congress was not ratifying any such interpretation when it declined to change the statute in 1939. Indeed, in 1937 and 1938, the Treasury had ruled that truck owner-drivers were employees of the companies for whom they worked. S. S. T. 307, Cum. Bull. 1938–2, p. 279; S. S. T. 198, Cum.

[17] *Texas Co.* v. *Higgins*, 118 F. 2d 636 (C. C. A. 2), decided April 4, 1941, is the first appellate decision in this line.

Bull. 1937–2, p. 393; S. S. T. 259, Cum. Bull. 1938–1, p. 397.[18]

II

THE WORKERS HERE INVOLVED ARE EMPLOYEES OF RESPONDENT

For reasons to be stated, we think that even under the tort liability test both the unloaders and the truckers are respondent's employees. But if we are incorrect as to that, these workers unquestionably fall within the borderline area, in which the weight of the additional factors of their economic dependence upon and integral relationship to the respondent's business is sufficient to shift the balance in favor of coverage.

A. THE FACTORS TO BE STRESSED UNDER THE SOCIAL SECURITY ACT

That the workers are engaged in activities which are both essential to and an integral part of respondent's enterprise cannot be doubted. The unloaders shovel coal from railroad cars into bins in respondent's yards. The truckers deliver coal to respondent's customers, and collect the price for respondent. These are activities which

[18] In A & C Mimeo. No. 5722, July 22, 1944, the Bureau subsequently acquiesced in the contrary decision in *United States* v. *Mutual Trucking Company*, 141 F. 2d 655 (C. C. A. 6). That acquiescence was induced in large part by the Solicitor General's determination not to petition for certiorari. Until the present conflict arose between the instant case and *Grace* v. *Magruder*, 148 F. 2d 679 (App. D. C.), this Court was unwilling to review cases of this sort. *Glenn* v. *Beard*, 323 U. S. 724; *Grace* v. *Magruder*, 326 U. S. 720.

normally would be carried on by employees of the business. It is also clear that the workers are economically dependent upon respondents in the same sense as persons who are undoubtedly employees. The unloader and the four truckers who testified all declared that they worked steadily for respondent and received the major portion of their income from him. See pp. 3, 5–7, *supra*. It is not material that this may not have been true of all unloaders and truckers; it can be said of any group of employees that some work for the employer only for a short time. Any employee may quit when he wants to, or be discharged at the employer's will, and there is invariably some turnover. But it is just as true in this case as in the case of an unquestioned employment relationship that the workers continue to work steadily at the same job for long periods even though they are not legally required to do so.

The workers' dependence upon respondent and their integration in his business enterprise must be considered along with those factors, now to be discussed, which show that there is good reason even on tort principles, and in accordance with tort cases, for holding them to be employees. If all are taken together, we submit that there can be no doubt that the workers in question are covered by the Social Security Act.

B. THE COMMON LAW OR TORT LIABILITY TEST

The court below held the unloaders and truckers not to be employees but independent contractors.

The tort authorities almost universally agree that an independent contractor is one who, *exercising an independent employment,* contracts to do a piece of work according to his own methods and *without being subject to the control of his employer* except as to the result of his work. Restatement of Agency, Section 220; 2 Cooley, *Torts,* (3d ed.) 1098; 1 Thompson, *Negligence* (2d ed.) 568–570; 1 Shearman & Redfield, *Negligence* (Rev. ed.) 399; Smith, *Master and Servant* (1906 ed.) 299–301; cf. Article 205, Treasury Regulations 90 (Appendix, *infra.*) These elements, properly understood, are not present in this case.

The unloaders.—Many courts have held in tort cases that persons who unload coal from railroad cars or perform work of the same sort, are employees. *Swift & Company* v. *Alston,* 48 Ga. App. 649 (coal unloader); *Holmes* v. *Railroad Co. et al.,* 49 La. Ann. 1465 (coal unloader); *Martin* v. *Republic Steel Co.,* 226 Ala. 209 (pit digger); *Muncie Foundry, etc., Co.* v. *Thompson,* 70 Ind. App. 157 (coke unloader); *Chicago, R. I. & P. Ry. Co.* v. *Bennett,* 36 Okla. 358 (coal unloader); *Murray's Case,* 130 Me. 181 (coal unloader); *Decatur Ry. Co.* v. *Industrial Board,* 276 Ill. 472 (coal unloader); *Benjamin* v. *Fertilizer Co.,* 169 Miss. 162 (fertilizer unloader). These cases are directly in point.[19] In *Grace* v. *Magruder,* 148 F.

[19] *Chicago, R. I. & P. Ry. Co.* v. *Bond,* 240 U. S. 449, is not to the contrary. The contractor there contracted with several railroad companies to undertake different types of opera-

2d 670, certiorari denied, 326 U. S. 720, the Court of Appeals for the District of Columbia held that coal hustlers doing work indistinguishable from that here involved were employees even under the common law test.

The unloaders merely shovel coal, clearly a simple kind of unskilled labor. "Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost conclusively a servant in spite of the fact that he may nominally contract to do a specified job of a specified price." Restatement of Agency, Comment (e) on Section 220 (2), p. 486. See to the same effect *Sadler* v. *Henlock*, 4 E. & B. 570 (Q. B. 1854–1855); *Wass* v. *Bracker Construction Co.*, 185 Minn. 70; *Swift & Company* v. *Alston*, 48 Ga. App., at 651–652; 20 A. L. R. 745; 65 L. R. A. 495.

The unloaders were told what cars to unload and where the coal was to be placed. What further supervision was necessary? Men do not have to be told how to wield shovels. As the Georgia court stated with respect to identical employment in *Swift & Company* v. *Alston*, 48 Ga. App. 649, 652:

> * * * It is inconceivable to this court that a large corporation of the character of the defendant would hire an unskilled man

tions, work which obviously was to be performed by a number of employees. The contractor was thus the manager of a separate enterprise, not a "mere shoveler of coal under a superior's command". (p. 456).

> to perform one of the simplest tasks of hard manual labor, requiring scarcely more than muscle in its performance, yet one that must be performed in the running of its industry, and absolutely relinquish all right of control and direction.

What constitutes control or supervision over the method and means of performing hired service is not subject to precise limits or definition, since the requirements of each case varies according to the nature of the work. The work may be such that little, if any, supervision is necessary, or even possible, if the employee has any experience whatsoever at the task he is performing; and the employer is not bound to waste time and effort upon useless supervision. As was observed in *Allied Mutuals Liability Insurance Co.* v. *DeJong*, 209 N. Y. App. Div. 505, 507:[20]

> So, too, with the question of supervision. One may be sent into a forest to fell trees or be sent to his home to sew garments and in either case be none the less an employee. If the employer chooses to order work so done as to waive supervision, this does not make the employee less an employee.

The statement of the Supreme Court of Wisconsin in *Allaby* v. *Industrial Commission*, 200 Wis.

[20] This case involved home workers, whose hours were not controlled, who did not work exclusively for the employer, who obviously were not supervised in detail, and who were paid by the piece. It reviews the New York decisions holding such persons to be employees.

611, 614, in holding wood cutters to be employees is pertinent here.

> What details of any consequence were there left to the exclusive control of Rogers [the employee]? There only remained for him to control the extent and time of the application of his muscular power * * *.

Many courts have indicated that the most important difference between an employee and an independent contractor lies in the right of the employer to terminate the relationship at will without liability.[21] *Industrial Commission* v. *Bonfils*, 78 Colo. 306 (coal hauler); *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254 (log hauler); *Martin* v. *Republic Steel Co.*, 226 Ala. 209 (pit digger); *Showers* v. *Lund*, 123 Neb. 56 (gravel hauler); *Burt* v. *Davis-Wood Lumber Co.*, 157 La. 111 (lumber hauler); *Coppes Bros. & Zook* v. *Pontius*, 76 Ind. App. 298 (log hauler); *Muncie Foundry, etc., Co.* v. *Thompson*, 70 Ind. App. 157 (coke unloader); *Holmes* v. *Railroad Co. et al.*, 49 La. Ann. 1465 (coal unloader); *Decatur Ry. Co.* v. *Industrial Board*, 276 Ill. 472 (coal unloader); *Murray's Case*, 130 Me. 181 (coal unloader).[22] As we have seen, *supra*, pp. 28–30, the significance of the right to terminate the relationship at will is that this alone, even in the absence of a showing of control actually exercised, is sufficient to sub-

[21] The independent contractor, as distinguished from the employee, is hired for a particular job and cannot be discharged without liability until the job is finished.

[22] These citations are taken only from cases involving unloaders and truckers such as are involved in this case.

ject the worker to the employer's authority. For the worker, in danger of being fired at will, is "from a practical standpoint * * * in a position of complete subservience". *Burruss* v. *B. M. C. Logging Co., supra,* at p. 258. See also *Showers* v. *Lund, supra.* As the Supreme Court of Colorado declared in *Industrial Commission* v. *Bonfils,* 78 Colo. 306, 308, a decision frequently cited in other states (and which is directly in point insofar as the truckers here involved are concerned):

> * * * By virtue of its power to discharge, the company could at any moment direct the minutest detail and method of the work. The fact, if a fact, that it did not do so is immaterial. It is the power of control, not the fact of control, that is the principal factor in distinguishing a servant from a contractor. *Franklin Coal & Coke Co.* v. *Ind. Com.,* 296 Ill. 329, 129 N. E. 811. The most important point "in determining the main question (contractor or employee), is the right of either to terminate the relation without liability." *Industrial Com.* v. *Hammond,* 77 Colo. 414, 236 Pac. 1006. This is a confirmation by this court of the rule above stated as to control, because the right immediately to discharge involves the right of control.

See also *Jones* v. *Goodson,* 121 F. 2d 176, 179 (C. C. A. 10), which states that "the right of discharge is a factor strongly indicating that the relationship exists", citing many cases.

In this case, although there was no formal con-

tract of hire, the relationship between respondent and the workers was obviously terminable by either at will. Inasmuch as the workers were dependent upon respondent for their main livelihood, they would not be likely to reject his instructions or suggestions, if he found it necessary to give any, any more than the employees in the cases cited. Since they may be ordered to quit at any time if their work is unsatisfactory, nothing further is necessary to subject them to the respondent's control.

The fact that the workers were permitted to work when they wanted and were usually paid by the ton instead of by the hour does not prevent them from being employees. *Swift & Company* v. *Alston*, 48 Ga. App. 649; *Martin* v. *Republic Steel Co.*, 226 Ala. 209; *Kirk* v. *Lime Co. and Insurance Co.*, 137 Me. 73; *Warner* v. *Hardwood Lumber Co.*, 231 Mich. 328; *Showers* v. *Lund*, 123 Neb. 56; *Bradley* v. *Republic Creosoting Co.*, 281 Mich. 177; *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254. Clearly the unloaders had none of the indicia of independent businessmen. They had neither a specialized skill nor any equipment except a shovel and pick.

It is true, in a sense, that the unloaders (and also the truckers) were "itinerant workers", as the court below described them (R. 91). That fact, however, is not pertinent to the inquiry, as was pointed out in the *Grace* case. The Social Security Act does not exempt itinerant workers. Title VIII specifically exempts "casual labor not

in the course of the employer's trade or business". 42 U. S. C. Sec. 1011 (b) (3). This strongly indicates that workers such as those here involved would be covered even if their work could be described as "casual", inasmuch as their activities were clearly performed in the course of the respondent's business. Cf. *Thompson* v. *Twiss,* 90 Conn. 444; *State ex rel. Northfield* v. *District Court,* 131 Minn. 352; *Sabella* v. *Brazileiro,* 86 N. J. L. 505. Furthermore, the limitation upon the exemption shows that Congress intended the Act to reach persons who earn their livelihood performing services in another's business. Under Title IX there is no exclusion for any type of casual labor; the definition of an "employer" as one who has eight or more persons in his employ *for some portion of the day,* indicates that the duration of employment is not an excluding factor. Section 907 (a), Social Security Act.

The truckers.—In many important respects what has been said as to the unloaders is also true as to the truckers. Many, although by no means all, courts in tort cases have held truckers such are are here involved to be employees.[23] *Industrial Commission* v. *Bonfils,* 78 Colo. 306; *Coppes Bros. & Zook* v. *Pontius,* 76 Ind. App. 298; *Burruss* v. *B. M. C. Logging Co.,* 38 N. M. 254; *Bradley* v. *Republic Creosoting Co.,*

[23] It is frequently stated in this field that each case turns on its peculiar facts. Although the facts in some of the cases here cited vary in minor respects from those in the present case, this is not true as to many of the cases cited. These are not, in our opinion, distinguishable at all.

281 Mich. 177; *Rouse* v. *Town of Bird Island*, 169 Minn. 367; *Industrial Commission* v. *Hammond*, 77 Colo. 414; *Maher* v. *Coal & Coke Co.*, 323 Mo. 799; *Kirk* v. *Lime Co. and Insurance Co.*, 137 Me. 78; *Showers* v. *Lund*, 123 Neb. 56; *Burt* v. *Davis-Wood Lumber Co.*, 157 La. 111; *Dunn* v. *Reeves Coal Yards Co., Inc.*, 150 Minn. 282; *Waters* v. *Pioneer Fuel Co.*, 52 Minn. 474; *Warner* v. *Hardwood Lumber Co.*, 231 Mich. 328; *Frost* v. *Blue Ridge Timber Corp.*, 158 Tenn. 18; *Lee* v. *Mark H. Brown Lumber Co.*, 15 La. App. 294. *Contra: Norton* v. *Day Coal Co.*, 192 Iowa 160; *Burns* v. *Eno*, 213 Iowa 881; *In re Estate of Amond*, 203 Iowa 306; *Southern Surety Co.* v. *Shoemake*, 24 S. W. 2d 7 (Tex. Com. App.).

The ticket which respondent gives the trucker accepting an order tells him where and when (if time is material) the coal is to be delivered, the type and amount of coal, whether the coal is to be sprayed or stacked, the price, and how the price is to be collected (see p. 7, *supra*). The trucker loads the coal, often using respondent's conveyor, and then delivers it in the manner indicated. For any person at all familiar with the work and the community no other instructions were necessary. A driver who did not own his own truck would also merely have to be told what kind of coal to load and where to deliver it; he would not have to be told what route to take or how the coal should be loaded or unloaded. Cf. *Burruss* v. *B. M. C. Logging Co., supra; Warner* v. *Hardwood Lumber Co., supra.* Thus, although

there could be no doubt that he was an employee, he could be subjected to no greater supervision or control than the truckers here.

The remarks of one of the witnesses typify the relationship. B. M. Tyner, who had driven for respondent for about 19 years (R. 74), when asked whether he had any understanding with respondent about following the directions of anyone, stated that he did not (R. 78). But in answer to the court's question, "There was no boss around?" he replied, "Well, he [Mr. Silk] was the only one. A man would naturally think he would be boss. If you haul coal, you would naturally take orders from him." (R. 78.)

The relation between the respondent and the truckers was, of course, terminable at will. For the reasons set forth, *supra*, pp. 28–30, 50–51, this in itself was sufficient to establish respondent's right of control, whether or not he found it necessary to exercise his authority. Indeed, most of the cases cited on pp. 50–51 were concerned with truck drivers.

It is also clear from the manner in which the enterprise was operated that respondent held himself responsible to outsiders for the conduct of the truckers. Customers made their complaints to respondent when the truckers had not properly cleaned their premises or had damaged their property. Respondent then took care of the cleaning and damage without charging the truckers. See p. 8, *supra*. Respondent also required that the trucks be insured, paying the

premiums originally himself and then charging the amount to the trucker (R. 40).

The court below relied on the freedom of the truckers in respect to working hours, and implied that their work for respondent was spasmodic and irregular. But the record shows that in fact the truckers reported for work early in the morning (R. 49–50, 60, 68, 75) and regularly, often for many years (see pp. 5–7, *supra*). The large number of trips which the trucks averaged each day (*supra*, pp. 6–7) indicates that, despite the right to reject hauls and to choose their own hours, the truckers worked as steadily as ordinary employees.

The fact that they were paid on a piece work basis does not, of course, prevent them from being employees. Cf. *United States* v. *Rosenwasser*, 323 U. S. 360. Their dependence upon the business for their livelihood was such that even without attempting to control their hours respondent could be sure that they would be available to perform the work at satisfactory times.

The truckers' ownership of the trucks does not prove that the drivers are not employees. Ownership of equipment is a factor to be taken into consideration in determining whether the employment relationship exists. But the ownership of an automobile or truck used in one's work does not establish that the driver is engaged in an independent enterprise. A great many cases have

so held. See the cases cited, pp. 53–54, *supra*,[24] and *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518. A person may own his own truck and still be nothing more than a truck driver for the person whose product he hauls.

Clearly the record does not establish that the haulers were engaged in a general hauling business of their own. Instead, they were, in effect, merely truck drivers who owned their own trucks. They were engaged in selling their labor, rather than skill and experience; the work which they were performing was not the sort of work which requires the services of a specialist in a particular business, trade, or profession. The respondent was dependent upon these truckers to perform a necessary and regular step in the day to day operation of his business. They were dependent upon him for their day to day livelihood.

The nature of the work, type of compensation, and the workers' relationship to the public had no similarity to that of a lawyer, physician, engineer, construction contractor, broker, or business man whose relationship with his clients or customers is traditionally characterized by a genuine

[24] Social Security cases so holding are: *Willard Sugar Co.* v. *Gentsch*, 59 F. Supp. 82, 84 (N. D. Ohio); *Grand Rapids Gravel Co.* v. *United States* (W. D. Mich.), decided March 30, 1943 (1 P-H Social Security Tax Service, par. 33,786.60); *Bedford Pulp and Paper Co.* v. *Early* (E. D. Va.), decided April 6, 1944 (1 P-H Social Security Tax Service, par. 36,010). But cf. *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (C. C. A. 6).

independence and separation from the affairs of the employer's business. Cf. *Gulf Refining Co.* v. *Brown*, 93 F. 2d 870 (C. C. A. 4). To describe the workers, both unloaders and haulers, as being engaged in an independent trade, business, occupation, or profession would be a perversion of the terms.

In short, the truckers were not independent of the respondent's business and they were subjected to as much direction and control as was needed for the work they were doing. Even for purposes of tort liability this should suffice to make them employees.

C. THIS COURT IS NOT BOUND BY THE FINDINGS OF THE COURTS BELOW

Respondent has suggested (Brief in Opposition, p. 15) that the findings of the two lower courts in this case are binding upon this Court both because of Rule 52 (a) of the Federal Rules of Civil Procedure requiring appellate courts to accept findings *of fact* unless clearly erroneous, and by reason of this Court's policy against reviewing fact findings on which two lower courts have concurred. To the extent that these findings are inconsistent with the undisputed facts set forth in the Statement, they are "clearly erroneous" within the meaning of Rule 52. The rules referred to, however, apply only to fact finding in the strict sense, not to non-factual conclusions. Cf. *Baumgartner* v. *United States*, 322 U. S. 665, 670; *United States* v. *Appalachian Power Co.*, 311 U. S.

377, 404; *Bridges* v. *Wixon*, 326 U. S. 135. The question of the application of a statute to a particular situation has often been held to present a question of law for the appellate court, both generally [25] and in Social Security tax cases raising the very type of questions involved here.[26] In this case the question whether on the undisputed facts the truckers and unloaders are employees is not a factual one but one calling for the Court's conclusion of law as applied to the admitted facts.[27] And the basic issue as to the test

[25] *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 F. 2d 704, 705–706 (C. C. A. 3); *United States* v. *Anderson*, 108 F. 2d 475, 478–479 (C. C. A. 7); *Murray* v. *Noblesville Milling Co.*, 131 F. 2d 470, 474 (C. C. A. 7), certiorari denied, 318 U. S. 775; *Duquesne Club* v. *Bell*, 127 F. 2d 363, 364–365 (C. C. A. 3), certiorari denied, 317 U. S. 638; *Local No. 6167* v. *Jewell Ridge Coal Corp.*, 145 F. 2d 10, 12 (C. C. A. 4), affirmed, 325 U. S. 161; *Becker* v. *Loew's Inc.*, 133 F. 2d 889, 894 (C. C. A. 7); *Himmel Bros. Co.* v. *Serrick Corp.*, 122 F. 2d 740, 742 (C. C. A. 7); *United States* v. *Armature Rewinding Co.*, 124 F. 2d 589, 591 (C. C. A. 8).

[26] In these cases (of which the following are but a few) the power of the appellate court to redetermine the ultimate conclusion as to employment status is assumed. *Williams* v. *United States*, 126 F. 2d 129 (C. C. A. 7), certiorari denied, 317 U. S. 655; *Ridge Country Club* v. *United States*, 135 F. 2d 718 (C. C. A. 7); *Deecy Products Co.* v. *Welch*, 124 F. 2d 592 (C. C. A. 1); *Government Personnel Auto. Ass'n* v. *United States*, 124 F. 2d 99 (C. C. A. 5); *American Oil Co.* v. *Fly*, 135 F. 2d 491 (C. C. A. 5).

[27] The matters as to which the reviewing court is bound by the findings below are not the same as when findings of administrative bodies are being reviewed. The mixed question as to which an administrator's finding may be binding if rationally supported (*Dobson* v. *Commission*, 320 U. S. 489; *National Labor Relations Board* v. *Hearst Publications*,

to be employed in interpreting the statutory phrase "employment" clearly presents a question of law.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment below should be reversed.

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323 U. S. 111) are open for determination *de novo* under Rule 52 (a). See cases cited, note 25, *supra*. This result is supported not only by the history of Rule 52, but by the fact that on such matters, which are not purely factual, the trial judge does not have any such advantage over the appellate court resulting from superior expertness or specialization as does the administrative body in whom Congress has vested discretionary authority. This problem is discussed at some length in Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harvard Law Review 70, and particularly, 112–122.

APPENDIX

Social Security Act. c. 531, 49 Stat. 620:

TITLE VIII—TAXES WITH RESPECT TO EMPLOYMENT

* * * * *

SECTION 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date: * * *

(42 U. S. C. 1940 ed., Sec. 1001.)

SEC. 802. (a) The tax imposed by section 801 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. Every employer required so to deduct the tax is hereby made liable for the payment of such tax, and is hereby indemnified against the claims and demands of any person for the amount of any such payment made by such employer.

* * * * *

(42 U. S. C. 1940 ed., Sec. 1002.)

SEC. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date * * *

(42 U. S. C. 1940 ed., Sec. 1004.)

SEC. 811. When used in this title—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

(b) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer [with exceptions not herein relevant] * * *

(42 U. S. C. 1940 ed., Sec. 1011.)

TITLE IX—TAX ON EMPLOYERS OF EIGHT OR MORE.

* * * * * * *

SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year: * * *

(42 U. S. C. 1940 ed., Sec. 1101.)

SEC. 907. When used in this title—

* * * * * * *

(b) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer [with exceptions not herein relevant] * * *

(42 U. S. C. 1940 ed., Sec. 1107.)

Sections 1400, 1401 (a) (b), 1410, 1426 (a) (b), 1600 and 1607 (b) (c) of the Internal Revenue Code, in so far as pertinent here, are substantially the same as Sections 801, 802 (a), 804, 811 (a) (b), 901, and 907 (b) (c) set out above.

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

> ART. 205. *Employed individuals.*—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907 (c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act.
>
> The words "employ", "employer", and "employee", as used in this article, are to be taken in their ordinary meaning. An employer, however, may be an individual, a corporation, a partnership, a trust or estate, a joint-stock company, an association, or a syndicate, group, pool, joint venture, or other unincorporated organization, group, or entity. An employer may be a person acting in a fiduciary capacity or on behalf of another, such as a guardian, committee, trustee, executor or administrator, trustee in bankruptcy, receiver, assignee for the benefit of creditors, or conservator.
>
> Whether the relationship of employer and employee exists, will in doubtful cases

be determined upon an examination of the particular facts of each case.

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if

the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

* * * * * *

Article 3, Treasury Regulations 91, promulgated under Title VIII of the Social Security Act, insofar as pertinent here, is substantially the same as Article 205 of Treasury Regulations 90 set out above.

U. S. GOVERNMENT PRINTING OFFICE: 1947

No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER,

v.

ALBERT SILK, DOING BUSINESS AS ALBERT SILK COAL COMPANY.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

Albert Silk, doing business as Albert Silk Coal Company, submits this brief in opposition to the petition for a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit. The opinion of that court is now reported in 155 Fed. 2nd. 356.

STATEMENT.

This was a fact case. The findings are well supported by the evidence. There are no broad and far-reaching principles involved, and there is nothing in this case which affects the industry generally. The findings and decision are simply based upon the facts in the case. There may never be another similar case. Therefore, there is no reason to grant certiorari here.

Petitioner stresses a minor issue in the case as a ground for certiorari, as the unloaders presented only a minor question.

The principal issue in this case was whether the truckers were employees of respondent within the meaning of acts involved and the regulations issued in connection therewith. The unloaders were only incidental to the case, as the truckers were greater in number and the tax on the truckers was also greater. This court should not grant certiorari for the purpose of determining only a minor issue in a case, especially when the total amount of tax involved in this case is less than $1000.00.

THE UNLOADERS.

After making his findings of fact relative to the truckers, the trial court found as follows concerning the unloaders:

> "Plaintiff has another class of workers called unloaders. These are men who come to plaintiff's place of business and unload coal from the freight cars into bins or onto the ground, as the case may be. The unloaders come to plaintiff's yard and if there is any coal to be unloaded they are assigned a railroad car to unload and put the coal in designated places. These men work on their own time and furnish their own tools, and are paid an agreed price per ton. Plaintiff likewise does not hire these men or discharge them, and in no way controls their movements. They work as long as they wish, and quit when they wish, and are not under the direction or control of the plaintiff. Plaintiff neither has nor claims the right to

exercise any regulation or control over said unloaders, and does not actually exercise any regulation or control over them, and the relationship of employer and employee does not exist between plaintiff and said unloaders. These men also work for others at such times and on such terms as they wish, without the knowledge or consent of plaintiff." (R. 11)

When the Circuit Court of Appeals reviewed this case, it made the following comments about the unloaders:

"In addition to the truckers, the status of another class of workers, the unloaders, is involved in the appeal. The unloaders are men who come to appellee's coal yard and unload coal from cars into the bins. If when they come there is coal to unload they are assigned a car and the bin into which they are to put the coal. They furnish their own tools and are paid an agreed price per ton. They are not regular employees. They come and go as they please. They likewise work for others at times, without the knowledge or consent of appellee. The only direction given to the unloaders is as to the car assigned to them and the bin into which they are required to put the coal." (Page 358)

The evidence showed that these unloaders furnished their own tools and equipment, and worked on their own time. They were not told when to report for work or how long to work. They could work during the day time, or could work at night. The only instruction given to them by respondent was to point out the car to be unloaded and the

bin in which the coal was to be put. Some of these unloaders were known as floaters, and some of them unloaded coal for other coal yards in the city. (R. 55)

Joe Heberling testified that he was an unloader for a while. He furnished his own tools. When asked about the hours he worked, he testified "That was up to me, just how I felt." (R. 88) When asked whether he was under the direction of the yard foreman, he testified, "Well, if I wanted to listen to him. We just worked for ourselves." (R. 89) When asked if the yard foreman of respondent told him what to do, Heberling testified "He would tell us what needed to be done, and we would go ahead and do it the way we wanted to." (R. 90)

The evidence therefore amply supported the findings.

THE TRUCKERS.

Respondent originally employed regular transfer or trucking companies for his hauling. Several years before this case arose, respondent began the practice of engaging independent truckers for his hauling. (R. 29) These men are in fact independent workers who own their own equipment and trucks, and who furnish their own supplies and materials, and who work whenever they care to do so, for whomsoever they desire, and at whatever task they desire to undertake. This was not a scheme or plan by respondent to evade a tax, and no such conten-

tion has been made. Respondent had this method of delivery long before the tax in question was created. These independent truck owner drivers perform the same service which was formerly performed for respondent by the regular transfer and hauling companies.

These trucks do not bear the name, telephone number, or other insignia of respondent. The trucks are not left or stored at respondent's yard. (R. 31) Sometimes the truckers drive their own trucks, and sometimes they hire other men to drive the trucks and do the work. Respondent has nothing to do with these arrangements, and does not pay the extra help. The truck owner pays for his own help. (R. 35) The truckers would frequently not appear at respondent's yard for days at a time. They were not expected or required to give respondent notice or obtain his consent about not working. They just worked when they pleased. Sometimes they were doing work elsewhere. (R. 33). Sometimes they went hunting. (R. 65-66) Sometimes they were hauling for others. (R. 66, 73-74) This was a regular occurrence. (R. 83) Respondent had no control over them.

The Circuit Court of Appeals stated in its opinion that the truckers were under no duty to make a delivery, and, if a delivery is made, the trucker is under no duty to return to the yard, or to make further deliveries. The court further said:

"According to the testimony, appellee exercises no control over the truckers. They come

and go as they please; they are not formally hired or discharged; they are paid for whatever coal they deliver. They are paid for what they haul as they request, sometimes after each load, sometimes at the end of the day, and sometimes at the end of the week. Frequently they haul coal for other dealers, haul grain, foodstuff, furniture, wood, rock, or any other material for other merchants or for private citizens of the community. This is done without interference or control by appellee over them in any way. The truckers report for work at such hours as they may wish, leave when they wish, and come and go independently of any rules or regulations or contracts with appellee. If they do not want to haul coal, they do not report, or if they want to absent themselves for a week or two and then return, they do so. This in substance presents the relationship between appellee and the truckers.'" (p. 357)

The trial court made extensive findings of fact on the above points. (R. 9-11) Finding No. 6 on page 10 is, in part, as follows:

"According to the testimony of both the truckers and the plaintiff, the plaintiff exercises no control over the truckers. They report for work at such hours as they may wish, and they leave when they wish, and they come and go absolutely independent of any regulations, rules or contracts with Mr. Silk. They simply congregate at the plaintiff's yard and take advantage of his facilities in the hope that they will get an opportunity to haul coal to his customers who telephone plaintiff for it. ***

There are no terms of employment. The truckers are not hired or discharged formally in any

way as those terms are used in trade or in business. The testimony is that these truckers come and go as they wish. If they desire to leave early, they may do so, and they do so without the permission of or notice to the plaintiff or his assistant. They are paid by plaintiff as they request it, sometimes after each trip, sometimes at the end of each day, and sometimes at the end of each week."

Finding No. 7 on page 10 is as follows:

"The evidence discloses that in addition to the hauling said truckers do for plaintiff, they very often also haul for other parties. The evidence discloses that said truckers at such times and on such terms as they may fix haul grain, foodstuffs, furniture, coal, wood, rock and other material for citizens of the community, and all of this is done without the authorization, interference or control of the plaintiff in any way whatsoever."

Finding No. 8 on page 11 is as follows:

"Under the evidence in this case, the plaintiff neither has nor claims the right to exercise any regulation or control over these truckers, and does not actually exercise any regulation or control over them, and they are not employees of plaintiff, but are independent contractors, within the meaning of said laws. There is no relationship of employer and employee existing between them. The uncontradicted testimony of witnesses called on both sides is that there is no relation of employer and employee between plaintiff and these men. He does not hire them. He does not fire them. He simply maintains an exchange or place where these truckers with their own trucks and equipment can come and obtain delivery orders from him."

These truckers were following an independent trade or calling, and the court so found.

ARGUMENT.

NO CONFLICT EXISTS IN THE DECISIONS.

There is no conflict in the decisions as to the status of truckers who were working on the basis which existed in this case, and no such conflict is pointed out by the petitioner. Since the truckers were the main issue in this case, and there is no conflict in the decisions as to them, certiorari should not be granted.

Neither is there a conflict in the decisions as to the unloaders. This was a fact case, and the facts which were controlling in this case do not exist in any of the cases referred to by the petitioner. Those cases are easily distinguished.

Petitioner cites Grace v. Magruder, 148 F. 2d 679, where certiorari was denied by this court. That case is not in point, and has no application to the present case. There is a great difference between the work of coal hustlers and the work of the unloaders involved in this case. A coal hustler is an extra helper who accompanies the truck driver on the delivery for the purpose of carrying or wheeling the coal from the truck to the customer's coal bin. While respondent does not hire coal hustlers in his business, they are commonly used by other dealers and their duties are generally known. A coal hustler is assigned to a particular job or delivery, and

he must be ready to do the work when the delivery is made. There is no choice on his part as to when the delivery is to be made. His work is controlled entirely by the time of the delivery. Other instructions to the coal hustler are also necessary. He is instructed as to whether or not the coal is to be carried in with buckets or baskets, or whether it is to be wheeled in with a wheelbarrow. Also, in some instances it must be sprayed with water before it is put in the bin in order to avoid dust. He must also clean up the customer's yard when the work is completed. In many instances, it is necessary to unload the customer's coal on the parking and then have the coal hustler carry or wheel it to the customer's bin. Such extra duties and instructions do not apply to unloaders.

Also, it was specifically found in Grace v. Magruder that the employer not only had the right to supervise and control the coal hustlers, but that he actually exercised that right. The court said in that case that the coal hustlers worked under the "compelling supervision" of the employer. The employer in that case required the coal hustler to finish the job assigned, to get the signature of the customer, to return to the coal office and present the signed card, and receive his pay. There was no such finding in our case. In our case, both the trial court and the circuit court have specifically found that respondent neither has nor claims the right to supervise or control these workers.

Another distinction between our case and Grace v. Magruder is that in our case the truckers were the principal issue and the coal unloaders presented a secondary question, while in the Grace case the coal hustlers presented the principal issue.

Also, Regulations No. 90 and No. 91 issued by the Treasury Department which contain the definition of employer and employee were apparently not stressed in that case, as they are not referred to in the opinion. That court apparently relied almost entirely upon cases which were decided under the Fair Labor Standards Act and the National Labor Relations Act, both of which contain special definitions of the term "employment". No regulations were in existence under those acts which contained a definition of employment such as we have in this case in Regulations No. 90 and No. 91. Cases under the Fair Labor Standards Act and the National Labor Relations Act are easily distinguished from cases under the Social Security Act and Regulations No. 90 and No. 91 issued pursuant thereto, as stated in the case of Glenn v. Beard, 141 F. 2d 376. Entirely different definitions of employment are used. That court said on page 377:

> "The fact that such workers may be independent contractors does not, of itself, exclude them from the application of the Fair Labor Standards Act; they are embraced in the classification of employees, within the intendment of that statute, if they are suffered or permitted to work. *But there is no such definition or pro-*

provision relating to employment or employees in the Social Security Act."

Petitioner states that this court denied certiorari in the case of Grace v. Magruder. However, the denial of certiorari by the United States Supreme Court does not have the effect of an affirmance of the judgment sought to be reviewed. It should not be regarded as a decision on the law or the merits of the case, and it is not equivalent to an affirmance of the judgment. It does not imply an expression of opinion on the merits. It creates no inference regarding the correctness of the lower court's decision. Glick v. U. S., 93 Fed. 2nd 953; Talcott v. U. S., 23 Fed. 2nd 897.

Petitioner also cites United States v. Vogue, Inc., 145 Fed. 2d 609. An examination of the facts in that case readily distinguishes it from our case. In the Vogue case, the company furnished the workers a place to work, and furnished a part of the equipment. The workers were paid regularly each week on a commission or piece work basis. They were subject to call by the store, and handled such matters as were turned over to them. They did not have the right to reject the work offered to them, as is true in our case. They maintained regular hours, the same as other employees of the store, except in dull seasons. While the workers in the Vogue case had the right to work for outside parties, the company collected for such services from the outside parties and then paid the workers. Those facts do

not exist in our case, as Mr. Silk does not supervise any work done for other parties and does not collect for such services, and in fact has no knowledge of when or where the men are working when they are not at his place. In the Vogue case, the workers had no freedom as to whether or not they would perform the work offered to them, and they were not free to come and go of their own free will and accord. Therefore, the case is easily distinguished as the controlling facts are not comparable. The court also specifically found in the Vogue case that the employer not only had the right to direct and control the workers, but that he actually exercised it. These workers were performing the same duties for the employer in exactly the same way which they did while working on a straight wage basis instead of a piece work basis. No such facts exist in our case.

Petitioner also cites National Labor Relations Board v. Hearst Publications, 322 U. S. 111 or 64 S. Ct. 851. An examination of that case shows that it arose under a different statute than the one involved in our case, and also that different facts existed. The statute involved in the Hearst case was 49 Stat. 450, or 29 U. S. C. A. 152. That is an entirely different statute than the act under which this case arises. The Hearst case arose from the refusal of certain publishing companies to bargain collectively with a union representing the so-called news boys who distributed papers on the

streets of Los Angeles. There were several different kinds of news boys, those who bought the papers from the publishing plant and sold them about the streets, and those who had fixed places where the papers were delivered to them and sold to the public from a news stand operated every day on a full time basis by the news boys who were generally full grown men, and who devoted their full time receiving and selling the papers from the same spot day after day. These news boys who were working on a full time basis and who worked at the same place every day were the only ones held to be employees under the National Labor Relations Board Act. *All other classes of news boys were disregarded as not meeting the test for employment.* These full time news boys were under the direction and control of the newspaper company, and their activities and manner of doing business were under the direct supervision of a district manager. They were subject to discipline and discharge if they disobeyed the instructions of the district manager. They were subject to assignment to particular places or spots, and could be transferred from one place to another by order of the district manager. They received small salaries as compensation, and also a commission or profits from the sale of their newspapers, which was controlled by the price fixed by the district manager.

There is also another reason why the Hearst case is not applicable to our case. In the Hearst case, there was no special regulation defining employer

and employee or what constituted employment. However, in our case we have a definition of those terms in Articles 2 and 3 of Treasury Regulations No. 91. As stated in American Oil Company v. Fly, 135 Fed. 2nd. 491, those definitions adopt a much narrower construction of the terms.

Since the statute involved in the Hearst case is not the same statute which is involved in the Silk case, and since the facts relating to employment in the Hearst case are entirely different from those in our case, and also since we have in our case a specific regulation defining employer and employee and what constitutes employment, the Hearst case is not an authority in our case, and its implications cannot be extended to our case.

It is clear that the independent truckers in this case were not employees of respondent. In fact, the petitioner does not strongly urge that the truckers were employees. No facts existed to make them employees of respondent. See Regulations No. 90 and No. 91; 151 A. L. R. 1332; Radio City Music Hall v. United States, 135 Fed. 2nd 715; United States v. Mutual Trucking Co., 141 Fed. 2nd 655; Glenn v. Beard, 141 Fed. 2nd 376; Anglim v. Empire Star Mines Co., 129 Fed. 2nd 914.

In Anglim v. Empire Star Mines Company, 129 Fed. 2nd 914, the court held that the determination of whether an employer-employee relationship exists within the Social Security Act is to be judged not

by the presence or absence of a single evidentiary factor, but by an over-all view.

In view of the above, petitioner has wholly failed to show any conflict in the decisions.

FINDINGS ARE SUPPORTED BY EVIDENCE.

The evidence clearly supports the findings and judgment of the trial court and its affirmance by the Circuit Court of Appeals. No other conclusion could be reached from the evidence.

This court accepts findings of the District Court concurred in by the Circuit Court of Appeals, where no clear error is shown. Anderson v. Abbott, 64 S. Ct. 531 or 151 A. L. R. 1146.

It must be a strong case in which this court will set aside concurrent findings of the District Court and Circuit Court of Appeals. Goodyear Tire and Rubber Co. v. Ray-O-Vac Co., 64 S. Ct. 593.

In Mahnich v. Southern S. S. Co., 64 S. Ct. 455, this court held that a finding of seaworthiness, as regards injured seamen's right to indemnity under maritime law, is usually a "finding of fact" which the Supreme Court will not review.

Since the trial court fully and carefully tried the case, and made findings of fact which there is no evidence to contradict, and since the Circuit Court of Appeals has reviewed the case and has reached the same result, this court should accept those findings and refuse certiorari in this case.

It was held in General Talking Pictures Corporation v. Western Electric Company, 58 S. Ct. 849,

304 U. S. 175, 346, that concurrent findings of the District Court and Circuit Court of Appeals on questions of fact are not disturbed unless plainly without support in the evidence. It was also held in that case that a writ of certiorari will not be granted by the Supreme Court merely to review the evidence or inferences drawn from it.

In certiorari cases, petitioner has the burden of establishing error in the judgment which is asked to be set aside. Walling v. Jacksonville Paper Co., 63 S. Ct. 332, and Higgins v. Carr Bros. Co., 63 S. Ct. 337. Petitioner has wholly failed on this point in this case. We submit that the petitioner has not shown any error in the judgment in this case.

THE TEST OF EMPLOYMENT UNDER THE REGULATIONS.

Treasury Regulations No. 90 and No. 91, issued by the Bureau of Internal Revenue, clearly establish that to constitute the relationship of employer and employee under the act in question, the alleged employer must have control or the right of control not only as to *what* shall be done, but also as to *how* it shall be done.

Regulations 91, Article 2, page 3, provide as follows:

> "To constitute an employment the legal relationship of employer and employee must exist between the person for whom the services are performed and the individual who performs them, * * *."

Article 3 of the above regulations provides as follows:

> "ART. 3. WHO ARE EMPLOYEES.—Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an employment as defined in Section 811 (b) (see Article 2).
>
> However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee."

The regulations then set forth various illustrations of what constitutes employment under the act.

There is nothing in the rules and regulations of the department which show that a special test was required in determining what constituted employment within the act. All of the rules and regulations definitely show that the ordinary and usual meaning was applied to the term of employer and employee. Since there were no special definitions or constructions provided for, the established meaning of the terms should be used.

In 50 Am. Jur. 227 this rule of law is stated as follows:

> "Courts should be slow to impart any other than their commonly understood meaning to terms employed in the enactment of a statute, and it is the policy of the courts to avoid giving statutory phraseology in new, curious or peculiar, distorted, hidden, unusual, unnatural, strained or forced, artificial, refined, metaphysical, or subtle meaning. To the contrary, it is

> a general rule of statutory construction that words of a statute will be interpreted in their ordinary acceptation and significance and the meaning commonly attributed to them. The rule is that such words are to be given their natural received, popular, approved, and recognized meaning."

Petitioner is bound by the rules and regulations which were in effect at the time involved in this case, and should not be permitted to ask this court to apply any other test in determining whether or not the relationship of employer and employee existed.

In the case of Helvering v. Winmill, 59 Supreme Court 45, it was held:

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.
>
> Special provisions in treasury regulations limit the application of those of a broad and general nature relating to the same subject."

Petitioner argues that the purposes and objectives of the act in question are a part of a program to improve the economic position of workers in old age and in periods of unemployment. But petitioner has apparently overlooked the fact that the act and the above regulations contain very definite limitations as to the persons who are to receive its benefits. For instance, agricultural labor, domestic servants, persons who are self employed, and many

others are specifically exempted from the benefits of the act. As stated in some of the court decisions on this question, there are millions of workers in the United States who are not within the scope of this act, and there was clearly no legislative intention to place them within the act.

In Glenn v. Beard, 141 Fed. 2nd 376, 378, that court said that:

> "However, almost half of all the persons gainfully occupied in the United States, are excluded by Congress from the benefits of the statute. Senate Report #628, 74th Cong. 1st Session, p. 9."

It is very clear to us that there was no legislative intention to enlarge the meaning of the term "employer and employee" so as to include persons who were not actually employees. If Congress had intended to give any special meaning to the term "employment" or to the term "employer and employee", it could easily have done so, and it must be presumed that Congress would have done so had that been its intention. Since no special definition was given in the act, the usual meaning of the term "employer and employee" must be used, which does not conflict with Regulations Nos. 90 and 91.

In United States v. Mutual Trucking Co., 141 F. 2d 655, that court was considering a similar case, and in discussing the meaning of the term "employer", the court said that Congress might have given it the meaning contended for by the govern-

ment if that was what it meant, but it has not done so. The court said:

> "Congress might have provided that such a relationship should be considered an employment, but it has not done so. In fact the Senate rejected a House amendment which would have extended the coverage in the statute beyond the employment relationship. The House receded (Conference Report, August 4, 1939, to accompany House Resolution 6635, page 14), and the Act was passed with coverage limited to employees." (Page 659)

Hence, we have an interpretation made by Congress itself of the meaning of the term "employer and employee" as used in this Act.

In American Oil Co. v. Fly, 135 Fed. 2nd 491, that court said:

> "In 1939 an attempt was made in Congress to amend the Act so as to include them. The House of Representatives passed the amendment, but it was defeated in the Senate, and in conference. The amendment in terms proposed a departure from the master and servant test; its defeat must be taken as showing Congressional acquiescence in that test. The definition of employee made in the Regulations must stand." (p. 493)

Moreover, the administrative agency has adopted and published rules and regulations which explain and define the terms for the purposes of this act. (Treasury Regulations 90, Art. 205 and Treasury Regulations 91, Article 3.)

Those rules specifically provide that the words "employ", "employer", and "employee", as used

therein, are to be taken in their ordinary meaning. They further provide that:

> "Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, *not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished*. That is, an employeye is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. *In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and as to the methods for accomplishing the result, he is an independent contractor, not an employee.*"

These rules were adopted and distributed by the administrative agency for the guidance of persons affected by the act. Their meaning is clear and should be followed, and they are binding on the government and upon this court.

Under these definitions, if a worker is subject to the control or direction of his alleged employer merely as to the *result* to be accomplished, and not

as to the *means* and *methods* used in accomplishing the result, he is an independent contractor, and is not an employee.

The evidence in this case, when considered in its entirety, shows that the workers were subject to the direction and control of respondent only as to the *result* to be accomplished by their work. Under the above regulations adopted by the administrative agency, this is not sufficient to make them employees. Respondent did not either direct or have the right to direct the *means* and *methods* used to accomplish the result. The evidence to which the petitioner refers is evidence only of the *result* to be accomplished by the workers, and is not evidence as to the means and methods of accomplishing it. There is absolutely no evidence in this case which shows that respondent has the right to direct or control the *means* and *methods* used by these workers in accomplishing the result. These workers have absolute freedom in the performance of their duties, and respondent neither has nor claims the right to direct or control them as to the means and methods.

CONCLUSION.

We respectfully submit that certiorari should be denied in this case.

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No. 312

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALBERT SILK,
Doing Business as Albert Silk Coal Company,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENT.

KELLEY PRINTING CO., TOPEKA

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

No. 312

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALBERT SILK,
Doing Business as Albert Silk Coal Company,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED.

1. Whether independent truck owner-drivers who deliver when, where, and for whom they please, and who are paid on a tonnage basis, and who haul many different articles for other persons, are employees of respondent taxpayer within the meaning of the Social Security

Act, being 42 U. S. C. A. 1001 et sequa, Unemployment Compensation Acts, being 42 U. S. C. A. 1101, et sequa, and the Internal Revenue Code relevant thereto.

2. Whether itinerant coal unloaders who work when and where they please for different coal yards and at other types of endeavor, and who are paid on a tonnage basis, and who perform various services for other parties, are employees of the respondent taxpayer within the meaning of the laws above referred to.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are 42 U. S. C. A. 1001, et sequa, and 42 U. S. C. A. 1101, et sequa, and Treasury Regulations Nos. 90 and 91 promulgated thereunder, which are set forth in the appendix to the brief for the United States, and are therefore not repeated here.

STATEMENT.

The respondent deems the following statement necessary in order to correct certain apparently unintentional inaccuracies and omissions in the statement contained in the brief for the United States.

As is frequently the case with respect to briefs in appellate cases which have been prepared by counsel who did not try the case in the lower court, the brief filed by opposing counsel in this case does not in our opinion give true and proper emphasis to all the controlling facts, but, instead, places undue emphasis upon isolated and incidental matters which are clearly outweighed by other considerations definitely established by the testimony.

The trial court devoted an entire day to the trial of this case, and observed the witnesses as they appeared before him. He is an able and experienced trial judge. He

made extensive findings of fact and conclusions of law which are well supported by the evidence. These findings of fact and conclusions of law, and the entire record in the case, have now been reviewed and affirmed by the Tenth Circuit Court of Appeals, as reported in 155 Federal 2nd 356. They are well supported by the evidence, and are not seriously questioned here.

A. TRUCKERS.

Respondent had been engaged in the retail coal business in the city of Topeka for more than 26 years at the time of the trial of this case. (R. 19) He has never owned or operated his own trucks. (R. 21) Originally his coal was delivered by regular transfer or trucking companies. (R. 23) In more recent years, his deliveries have been made by independent truck owner-drivers who own and furnish their own trucks, supplies, tools and equipment, and who work on their own time and employ their own helpers. (R. 21) They are paid by the ton. (R. 22) Respondent does not have any interest in the trucks, (R. 21), does not help to finance them, (R. 23), does not furnish or pay for the oil, gas, tires or repairs, or direct where the same shall be purchased. (R. 21) Respondent does not furnish licenses for them. (R. 29, 54) The trucks are not required to be left at respondent's yard (R. 24) The trucker determines for himself whether he needs a helper on a delivery, and, if the trucker needs or desires a helper, he then selects his own helper, determines his rate of pay, and actually pays the helper. Respondent has nothing whatever to do with it. (R. 22, 55) The employment of the helper by the trucker does not increase the amount which respondent pays for delivery of the coal. The truckers own and furnish their own equipment, such as shovels,

forks and wheelbarrows. (R. 23, 51) In making deliveries, the truckers select their own route of travel. (R. 23)

The trucks do not carry the name, telephone number, insignia or other information about the respondent or his business, and respondent does not require that they do so. Years back, and long before this case was in question, respondent had some truck signs made, but they have not been in use during the years involved in this case, with the possible exception that a few truckers voluntarily used those old signs for a short time in 1936. This was not done at the direction or compulsion of respondent. (R. 26, 49) It was just for a short period of time. (R. 77, 80) These were old signs that were lying around the yard at the time, and were not made or intended for these men.

Respondent enters his trucking expense on his books under the heading of "hauling". (R. 27)

The truckers come and go as they please. (R. 24) There are no regular working hours. They do not check in or out, or report to anyone. They make no arrangements with respondent about coming or going. (R. 81) They either show up sometime during the day, or they do not show up at all. They do not notify respondent as to whether they will be available or not. There are days when some of the truckers do not come to the place at all. This is a frequent occurrence. (R. 27, 28) Respondent is never sure whether he will have any trucks for his deliveries. He is embarrassed every day about promising deliveries because he cannot get enough truckers to make his deliveries. He never knows who is going to show up to make them. (R. 37, 38) The times when they came to his establishment varied. Sometimes the drivers show up early in the morning, sometimes they show up about 11 A. M. or noon, and some

times they do not come in at all. (R. 37, 38, 49, 50)

Respondent does not select the trucker who is to make a delivery. The truckers determine among themselves who will answer the next call. (R. 25) The truckers have prepared at their own volition a call system by which they determine among themselves the order in which they will have an opportunity to make deliveries. It has been referred to as a "call board". The last one in goes to the bottom of the list, and the one who has been waiting the longest is entitled to the first call. (R. 25) The truckers are not required to accept their turn when a call is received. The truckers can and frequently do refuse a delivery for any reason whatsoever, or for no reason at all. (R. 41) They exercise this right quite often. It is a common occurrence. (R. 25) Perhaps the trucker does not care to handle the type of coal which has been ordered, or that he does not care to drive the distance necessary to make the delivery, or he does not like the customer or the way in which the coal must be put in the customer's bin, or it is too late in the day for him to make the delivery. (R. 75) If that driver refuses the delivery, respondent rings again and the next man on the "call board" is offered the delivery. He may accept or reject it. (R. 76) When the trucker makes a delivery, he is not required to return to the yard. Sometimes truckers return to the yard and sometimes they do not return. They can collect their compensation after each trip, or each day, or each week, or whenever they want it. (R. 26, 40)

One trucker who had made deliveries for respondent failed to come in for further deliveries, but sent his truck with another driver who made some deliveries. Respondent did not know for sometime what had happened to the owner of the truck, or where he was working. The truck owner made no advance arrangements with re-

spondent about being away, or about the selection of the driver who would use the truck during the owner's absence. (R. 28, 54)

On another occasion, three or four truckers went away for about a week without notifying respondent or making prior arrangements with respondent, and respondent did not know where they had gone, or when they would return, and did not know until after they returned where they had been. (R. 28, 54) This was a regular occurrence. (R. 66)

Another trucker who had been making some deliveries for respondent sold his truck and went to work on a farm, and respondent had no notice of it and no arrangements were made with respondent about it. Respondent learned of it through rumors after it had taken place. (R. 28-29)

Respondent does not require the truckers to return to the yard after a delivery, (R. 26) or to stay at the yard between deliveries. If they wait at his yard for a delivery they read stories, play cards, or just sit around and talk. Respondent makes no requirement of them while they are waiting at the yard for another delivery, and does not claim the right to do so. (R. 30)

In about one per cent of the deliveries, chutes are needed or requested by the customer in unloading the coal. Sometimes the truckers will refuse to take a delivery if they do not care to use a chute. The truckers have the right to decide whether they will use a chute. On many occasions they have refused to use chutes. (R. 29-30, 43)

If wheelbarrows are needed to wheel in the coal at the place of delivery, the truckers furnish them. (R. 37)

If a customer makes a complaint about a delivery, respondent may or may not tell the trucker. All respondent can do is to tell the trucker about the complaint.

He can do nothing else. (R. 39) Sometimes the truckers corrected the matter to satisfy the complaint, and sometimes they didn't. (R. 77)

Respondent does not have written contracts with the truckers. (R. 24, 54)

Respondent has never fired or discharged any of the truckers, and does not claim that right. (R. 39, 58, 78, 79) See also findings of fact Nos. 6, 8 and 9. (R. 8-9)

These truckers haul coal for other coal dealers, and also haul grain, hay, furniture, wood, rock, sand or anything they may desire. Respondent has no control over them as to when or how they do such work, or the amount they charge for the same. Respondent has nothing to do about their compensation for such services. It is not paid through or reported to respondent in any way. (R. 25, 54)

They also hauled for the Central Coal Company, H. Morton White Coal Company, Morris Coal Company, and some of them hauled direct from the mines. (R. 54) Clayton Oldham testified that during the years in question, he hauled ice for the American Ice Company, cream and milk for the Beatrice Creamery, rockwool for the Parker Insulating Company, coal for the Central Coal Company, and rock, livestock and grain. (R. 59-60)

There is no substantial variance or conflict between the testimony of the respondent and that of the truckers about the above matters. Their testimony was supported by Paul Taylor, a man who had assisted respondent in his office during the years in question, and who was familiar with the facts, and who at the time of the trial was no longer employed by respondent but was employed in another city. He was an entirely impartial witness. (R. 48)

B. UNLOADERS.

The other persons involved in this case are known as unloaders. They work on their own time and furnish their own tools and equipment. They are paid by the ton. They are commonly referred to as floaters or itinerant workers. They unload coal at any or all of the coal yards from the railroad cars into the bins. They do not work regular hours, and come and go as they please. They may work during the day time or may work at night. They are not told when to go to work or when to quit, or when to go to meals. The only instructions given to them by respondent are that respondent points out the car to be unloaded, which has been spotted by the railroad company, and the bin where the coal is to be put. Respondent has 48 hours after a car is spotted to unload it before demurrage starts. Sometimes the same unloaders return to respondent's yard to unload other cars, and sometimes strangers who have not previously unloaded for respondent do it. (R. 43-47) When asked whether he was under the direction of respondent's yard foreman, the unloader who testified on that subject said that "they listen to the foreman if they want to", but that "they just worked for themselves." (R. 72)

B. M. Tyner, who was the witness called by the United States at the trial of this case, was asked what arrangement he had with respondent and his answer was "just the price of pay." (R. 74) He further testified that he had no understanding with respondent about following directions from anyone, and that they very seldom got orders from the yard foreman, and, if they did, sometimes they followed his directions and sometimes they did not, and that nothing happened if they disobeyed. (R. 78)

These facts and many additional facts were before the court; and amply support the decision in the case.

At the close of the evidence in the trial court, the judge informed counsel for appellant that they had failed to make a case. Counsel for appellant admitted to the court that there were some things that were not just exactly the way he thought they would go. The trial court then stated he thought an ideal relationship existed between these parties, and he thought they did not want the tax paid, and should be let alone. (R. 83)

We believe the above facts are important in this case, and we respectfully request this court to carefully consider the same.

ARGUMENT.

The method used by respondent in making deliveries of coal has been used by him during the entire time he has been in business. This was over 26 years at the time of the trial. It is not a plan developed by him after the law was enacted for the purpose of attempting to evade the tax. This fact should carry considerable weight.

The act authorizes the administrative agency to make rules and regulations, which it has done. These are Regulations 90 and 91. They are the same so far as the issues involved in this case are concerned, and were in force during the time involved in this case.

These regulations and rulings have consistently held that such truckers and unloaders as are involved herein were not employees of the coal dealer under the act in question. There were presented during the trial copies of rulings made by the administrative agency showing that the agency did not consider such persons to be employees, and had so ruled in several other cases.

Those rulings are set out in the appendix to this brief. Those rulings having been made by the administrative agency, and having been in effect during the time involved in this case, should therefore carry considerable weight in determining this case.

Appellant apparently confuses this case with cases which have arisen under the National Labor Relations Act. That is an entirely separate and distinct act, and the cases decided under it are not controlling here. That act contains a definition of employment which is very broad and all inclusive. There is no such broad definition relating to employment in the Social Security Act.

A taxpayer is entitled to great consideration in a situation of this kind. Respondent has acted in the utmost good faith. The truckers and unloaders were satisfied with this arrangement. They are not asking that the tax be paid. They were not dissatisfied and were not claiming more than they were receiving from respondent for the services they performed. They had the utmost freedom, and were not under the jurisdiction or control of respondent in any way. He neither had nor claimed the right to exercise control over them as to the method in which they performed their contracts. Any control which he had was only as to the result obtained, and not to the method or details of the job. This did not make them employees under the regulations.

When a taxpayer has carried on his business in this manner, and when the arrangement which has existed for many years meets the requirements of the regulations adopted by the agency, and also comes within the rulings announced by the agency in other cases, the taxpayer should not be held liable for the tax. He did not collect any of this tax from these men. What else was there for him to follow or adopt as a guide? He cannot go back and collect from the men who were

itinerant, and disappeared. He follows the rules. It is unjust and absurd to make him pay a tax contrary to those rules and penalize him for not levying a tax upon the owner truckers and unloaders, which under those rules laid down by this very agency he had no right to levy. These rulings were furnished to respondent through the Greater Kansas City Retail Coal Merchants Association, and he had knowledge of them at that time. Those rulings specifically exempted certain other coal dealers from the payment of these taxes during the time involved in this case. Since there are no facts in our case which distinguish it from the cases in which the rulings were made, the same exemption from taxation should apply to this respondent. It certainly would be grossly unfair and inequitable to require this respondent taxpayer in Topeka, Kansas, to pay taxes under this act, while at the same time coal dealers located in Kansas City, which is only 75 miles from Topeka, have been exempted from payment of the tax. This would constitute unfair discrimination and should not be permitted.

THE FINDINGS BY THE TRIAL COURT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND SHOULD BE FOLLOWED BY THIS COURT.

Appellant apparently feels that the Circuit Court did not fully consider this case and apply the proper construction to it. We find no basis for such a contention. The opinion shows that the court carefully analyzed the facts, and then referred to the act and the regulations adopted under it. The court then said that the relationship between respondent and the haulers and unloaders fails to measure up to any of the standards laid down in the act or in the regulations; that in a legal sense there is no employment; that the relationship between respon-

dent and the unloaders is not materially different from that between him and the haulers; and that the undisputed facts fail to establish such reasonable measure of direction and control over the methods and means of performing the services as is necessary to establish a legal relationship of employer and employee.

The decision of the lower courts is well supported by the facts and the law.

The evidence in this case shows that the workers were subject to the direction and control of respondent only as to the *result* to be accomplished by their work. Under the regulations, this is not sufficient to make them employees of the respondent. Respondent did not direct or have the right to direct the means and methods used to accomplish the result. The evidence to which appellant refers, when considered in its entirety along with all the other evidence in the case, is evidence only of the *result* to be accomplished, and not as to the *means* and *methods* for accomplishing it. The evidence in the case does not show that this respondent has the right to direct or control the means and methods used by these workers in accomplishing the result. In fact, we know of no comparable situation where the workers are actually as free from control and direction as they are in this case. They have absolute freedom in the performance of their duties. Respondent neither has nor claims the right to direct or control them as to the means and methods by which they do their work. The trial court heard all the evidence and made specific findings of fact and conclusions of law on these points. Those findings and conclusions have been reviewed by the Circuit Court of Appeals, 10th Circuit, and affirmed. The fact that both of the lower courts have carefully considered this case and have held in favor of respondent should carry great weight with this court. It seems to us that

this court should not and will not lightly overturn or disregard a decision that has been considered and determined by both of the lower courts in favor of this respondent.

Under the established rule, this court accepts the findings in which two courts concur, unless clear error is shown. Pick Mfg. Co., v. General Motors, 299 U. S. 3; U. S. v. Commercial Credit Co., 286 U. S. 63; and Anderson v. Abbott, 64 S. Ct. 531, or 151 A. L. R. 1146.

It must be a strong case in which this court will set aside concurrent findings of the District Court and the Circuit Court of Appeals. Goodyear Tire & Rubber Co. v. Ray-O-Vac Co., 64 S. Ct. 593.

It was held in General Talking Pictures Corporation v. Western Electric Company, 58 S. Ct. 849, 304 U. S. 175, 546, that concurrent findings of the District Court and Circuit Court of Appeals on questions of fact are not disturbed unless plainly without support in the evidence.

THE ADMINISTRATIVE AGENCY ADOPTED REGULATIONS AND MADE RULINGS THEREUNDER WHICH WERE IN EFFECT DURING THE TIME INVOLVED IN THIS CASE, AND ARE THEREFORE CONTROLLING HERE.

The Social Security Act specifically authorizes the adoption of regulations for the administration of the act. Pursuant thereto, regulations number 90 and 91 were adopted by the administrative agency, and were in force during the time involved in this case. The regulations are set forth in the appendix to the brief of appellant. The administrative agency made and announced rulings in similar cases during the time involved in this case, as shown in the appendix to our brief.

We believe appellant is now trying to ignore these established regulations and rulings, and change the same in order to include independent contractors and workers who have not heretofore been included, and who do not come within the definitions which have been and now are in effect. This should not be permitted. If any change in the definition of employment is deemed necessary in order to broaden the coverage, it is for the Congress to make that change, and not the administrative agency. It would be a most unusual and alarming situation for the appellant to be permitted to broaden in this manner the definition of employment after the Congress has specifically refused to broaden it. This administrative agency has no power to legislate. Its duties are limited. It can only administer the law as it has been enacted by the Congress, and, when Congress, with full knowledge of these administrative regulations and rulings, has refused to broaden the definition of employment by legislative enactment, that should settle the matter. We understand this to be one of the well established principles of administrative law.

The rule of law is well established that the administrative regulations and interpretations of an administrative statute are persuasive evidence of its true construction, and are entitled to respectful consideration, and should not be overruled except for weighty reasons. Helvering v. Wemmill, 59 Supreme Court 45, Cully v. Mitchell, 37 Fed. 2nd 493, Nicholas v. Richlow Mfg. Co., 126 Fed. 2nd 16, 59 C. J. 1025, and Bank v. Commissioner, 39 Fed. 2nd 58. Not only should appellant be governed and bound by its announced rulings and regulations which were in effect at the time involved in this case, but this court should recognize its potency.

THESE REGULATIONS HAVE RECEIVED CONGRESSIONAL APPROVAL.

It should also be borne in mind that there are many classes of workers who admittedly are not covered by the act. Appellant argues that the purposes and objectives of the act in question are a part of a broad congressional program to improve the economic position of those who must work for others for a living. What appellant has apparently overlooked is that there are very definite limitations in the act as to the persons who are to be covered thereby. For instance, agricultural labor is specifically excluded. Domestic servants are also specifically excluded. Certain kinds of casual labor are also outside the scope of the act. Also, persons who are self-employed are not within the terms of the act. It is very clear to us that there was no legislative intention to enlarge the meaning of the term "employment" so as to include persons who are not actually employees in the legal sense. If the Congress had intended to give any special meaning to the term "employment", or to the term "employer and employee", it could easily have done so, and it must be presumed that Congress would have done so had that been its intention. It has done so in other instances. Since no special definition of employment was given in this act, the usual meaning must be used. This is what the regulations of the department and the rulings made thereunder very definitely establish. Therefore, it seems to us that the argument advanced by appellant about the interpretation to be given in this case is without foundation.

In 1939, the Congress was considering certain amendments to the Social Security Act. One of the amendments it considered was the broadening of the definition of employment. The regulations by the department,

being Regulations 90 and 91, were in force at that time. However, the Senate Committee did not adopt a broader definition of employment, and therefore that proposal did not become a part of the law. This left the definition of employment the same, and constituted congressional approval of the regulations and rulings made thereunder. On page 12352 of the Senate Congressional Record for July 11, 1939, it is pointed out there were several proposals to modify the definition of employment. One was a proposal in the House bill for the extension of coverage to include salesmen, and pointed out that under the present law, whether a salesman is covered *depends upon the test of whether he is an employee in the legal sense.* The committee reported that it would be unwise to attempt any change at that time. This congressional report therefore specifically shows that what Congress had in mind was and is the legal test of the employer and employee relationship. This situation makes the strongest possible case of legislative approval of the prior administrative construction. Poe v. Seaborn, 282 U. S. 101, 116, and U. S. v. Ickes, 98 Fed. 2nd 271, 280.

In the case of Glenn v. Beard, 141 Fed. 2nd 376, 378, it was pointed out that almost half of all the persons gainfully occupied in the United States are excluded by Congress from the benefits of the statute. (Senate Report No. 628, 74th Cong. 1st Session, p. 9)

Several courts which have been called upon to consider the question of employment under this act have recognized the position which Congress took on the proposal to broaden the coverage, in addition to the case of Glenn v. Beard, supra.

In the case of United States v. Matual Trucking Co., 141 Fed. 2nd 655, that court was considering a similar case, and, in discussing the meaning of the term "em-

ployment", said that Congress might have provided that such a relationship should be considered an employment, but it has not done so. The court further said that:

> "Congress might have provided that such a relationship should be considered an employment, but it has not done so. In fact, the Senate rejected a House amendment which would have extended the coverage in the statute beyond the employment relationship. The House receded (Conference Report, Aug. 4, 1939, to accompany House Resolution 6635, page 14), and the Act was passed with coverage limited to employees." (Page 659)

In the case of American Oil Co. v. Fly, 135 Fed. 2nd 491, that court said:

> "In 1939 an attempt was made in Congress to amend the Act so as to include them. The House of Representatives passed the amendment; but it was defeated in the Senate, and in conference. The amendment in terms proposed a departure from the master and servant test; its defeat must be taken as showing Congressional acquiescence in that test. The definition of employee made in the Regulations must stand." (Page 493)

As stated by Mr. Justice Frankfurter in his opinion in the case of D. A. Schulte, Inc., v. Gangi, 66 S. Ct. 925,

> "For purposes of judicial enforcement, the policy of a statute should be drawn out of its terms, as nourished by their proper environment, and not, like nitrogen, out of the air. Before a hitherto familiar and socially desirable practice is outlawed, where overreaching or exploitation is not inherent in the situation, the outlawry should come from Congress. To that end, some responsibility at least for a broad hint to the courts, if not for explicitness, should be left with Congress." (Page 932)

CASE MUST BE DECIDED BY A GENERAL OVER-ALL VIEW OF FACTS.

This case must be decided by a consideration of all the facts and circumstances involved, and not by isolated or incidental matters. In any normal business transaction, the parties naturally show some spirit of cooperation in carrying out the intent and purpose of their contract. However, this cooperation should not be confused and misunderstood, and assumed to be control of the worker, when such is not the fact.

The test of whether one is an employee or an independent contractor within the Social Security Act is the degree to which the principal may intervene to control the details of the agent's performance. The employer-employee relationship under the Social Security Act is to be judged by the presence or absence of no single evidentiary factor, but by an *over-all* view. Spillson v. Smith, 147 Fed. 2nd 727. Anglim v. Empire Star Mines Co., 129 Fed. 2nd 914.

It was pointed out in Willian. v. U. S., 126 Fed. 2nd 129, 131, 132, that acts of control found to have been exercised "at times" were so indefinite and uncertain that they must give way to the uncontroverted findings which lead to an opposite result. Such facts are not controlling.

NECESSITY FOR AND EXTENT OF CONTROL.

If there is no control or the right to exercise it, then there can be no relationship of employer and employee. The right to control is a necessary element of the relationship. The trial court found that no such right existed in this case, and the Circuit Court has approved that finding.

The legal relationship of employer and employee must exist in order to create liability for this tax. To constitute the relationship of employer and employee, the employer must have control or the right of control not only as to *what* shall be done, but also as to *how* it shall be done. If the worker is subject to control only as to the *result* to be accomplished by the work, and not as to the means and methods of accomplishing the result, he is an independent contractor.

Regulations 90 and 91 specifically provide that if the worker is subject to the control or direction of the alleged employer merely as to the result to be accomplished by the work, and not as to the means and methods of accomplishing the result, he is an independent contractor.

Whether the relationship of employer and employee exists must depend upon the facts and circumstances of the particular case. Yellow Cab Co. v. Magruder, 49 Fed. Supp. 605; 141 Fed. 2nd 324.

The test in determining whether one is an independent contractor or an employee within the Social Security Act lies in the degree to which the alleged employer may intervene to control the *details* of the work. Radio City Music Hall Corporation v. U. S., 135 Fed. 2nd 715.

The test of the existence of the relationship of independent contractor is whether the one who is claimed to be an independent contractor has contracted to do the work

according to his own method and without being subject to the control of the alleged employer except as to the result of the work. Glenn v. Standard Oil Company, 148 Fed. 2nd 51.

The test of whether one is an employee or an independent contractor within the Social Security Act is the degree to which principal may intervene to control the details of the agent's performance. Spillson v. Smith, 147 F. 2nd 727.

An "employee" for federal employment tax purposes is one who meets the test of established concept of the legal relationship of employer and employee. Israelite House of David v. U. S., 58 F. Supp. 862.

The legal relationship of employer-employee must exist between person for whom services are performed and the individual who performed them. Bartels v. Birmingham, 59 F. Supp. 84.

In 144 A. L. R. 740 and also in 151 A. L. R. 1331 are annotations on the question of whether or not one who uses his own truck is an independent contractor or an employee of the concern for which he transports the goods, within the meaning of the Social Security Act. The later annotation points out that in the later cases on the question, the courts have recognized that under the circumstances present, one using his own truck to transport the goods of another was an independent contractor, rather than an employee, within the meaning of the Social Security Act.

A. The Common Law Test.

Under the Statutes and regulations governing social security and unempolyment tax, which follow the common law, "employment" means the legal relationship of employer and employee, and does not include an independent contractor. One who does not meet the tests of established concept of legal relationship of employer and employee is not an employee within the Social Security Act. The test of the existence of the relationship of independent contractor is whether the one who is claimed to be an independent contractor has contracted to do the work according to his own methods and without being subject to control of employer except as to the result of the work. If the relationship is that of independent contractor, it excludes the burden of the Social Security Tax. Many cases have announced and followed these rules, and the same have now become well established. That the common law test of employment exists under the social security law and the regulations adopted pursuant thereto is shown by the following cases: U. S. v. Mutual Trucking Co., 141 F. 2nd 655, Glenn v. Standard Oil Company, 148 F. 2nd 51, Matcovich v. Anglim, 134 F. 2nd 834, Texas Co. v. Higgins, 118 F. 2nd 636, 638, Tidwell v. U. S., 63 F. Supp. 609, Nebraska Nat. Hotel Co. v. O'Malley, 63 F. Supp. 26, Emard v. Squire, 58 F. Supp. 281, and Hirsch v. Rothensies, 56 F. Supp. 92. This is what the Congress intended, as clearly shown by page 12352 of the Senate Congressional Record for July 11, 1939, which states that whether a salesman is covered depends upon the test of whether he is an employee in the legal sense. In the case of Anglim v. Empire Star Mines Co., 129 F. 2nd 914, 917, that court pointed out that it is said that the language of the concluding paragraph of the regulations, relating

to physicians, etc., assumes that a person is not to be classed as an independent contractor unless he follows an independent vocation, offering his services to the public, but the court said that those general exclusions do not modify the tests previously outlined in the regulations, and that they were not so intended.

The evidence in our case shows that these truckers actually offered their services to the public, and hauled many other things besides coal. They not only hauled coal for many other dealers, and hauled coal direct from the mines, but they hauled rock, sand, furniture, grain, building material, and many other things. They sometimes received these calls at respondent's yard.

B. Respondent Did Not Choose Trucker for Specific Delivery.

It is uncontradicted in the evidence that respondent did not know what trucker would make any particular delivery. The truckers voluntarily set up a call board, by which the first trucker to come in was given the opportunity of taking the first delivery, and on down the line until the last trucker was required to wait until all the other truckers had been given a turn. It is also uncontradicted that the truckers would frequently refuse to take a delivery and respondent was required to ring for another trucker until he found one who would make the delivery. When respondent rang for a trucker, he had no way of knowing who that trucker would be until the man appeared in answer to the call. This fact is very significant. In the case of U. S. v. Mutual Trucking Co., 141 F. 2nd 655, 656, 659, the Circuit Court of Appeals, Sixth Circuit, held:

> "'In determining whether owner-operators of tractors and trailers were employees of trucking com-

pany so as to render company liable for social security or federal insurance contributions, that company usually did not know in advance what particular driver was to take the freight was cogent evidence that while company instructed owner-operators when and where to transport the freight it did not instruct them as to how to transport it."

The court held in that case that the relationship of employer and employee did not exist, and that there was not such control as to create the relationship of employment.

C. Right to Discharge Must Exist.

Under Regulations 90 and 91, the right to discharge is also an important factor indicating that the person possessing that right is an employer. This statement is taken from the regulations above referred to which were in effect during all the time involved in this case. The evidence was uncontradicted to the effect that respondent did not have or exercise any such right over any of these parties, and the trial court so found. See findings 6, 8 and 9. Therefore, one of the important elements of the employer-employee relationship is lacking in this case. In the case of Williams v. U. S., 126 Fed. 2nd 129, the Circuit Court of Appeals, Seventh Circuit, held that since the right to control involves the power to discharge, the relation of master and servant will not exist unless the power to discharge exists. In the case of Whalen v. Harrison, 51 Fed. Supp. 515, it was held that the relation of master and servant does not exist within the Social Security Act unless the power to discharge also exists. In the case of General Wayne Inn v. Rothensies, 47 Fed. Supp. 391, it was held that the power to hire and fire is the most significant factor

in determining this question. In the case of Texas Co. v. Higgins, 118 Fed. 2nd 636, 639, the Circuit Court of Appeals, Second Circuit, pointed out that under the regulation involved, being the same regulation involved here, the right to discharge was an important factor, and did not exist in that case. In Jones v. Goodson, 121 Fed. 2d 176, the court held that the right of discharge is a factor strongly indicating existence of the master and servant relationships. This is in accord with the general rule of law 42 A. L. R. 1406.

D. It is Not Important that Some Part of the Services May Have Been Performed on the Premises of Respondent.

In many instances, an independent contractor is called upon to perform services on the premises of another, but this fact alone does not create the relationship of employer and employee. When a house owner calls a plumber or a painting contractor to perform services on his house, the fact that the work is done on the premises does not constitute employment. The worker may still be an independent contractor.

There are several cases decided under the Social Security Act in which the services were performed on the premises of another, and the court held that this fact alone did not create the relationship of employer and employee. An example of this class of cases is Radio City Music Hall v. U. S., 135 Fed. 2nd 715, where vaudeville actors or performers put on their entertainment on the premises of the alleged employer, but the court held that this fact did not make them employees. The same ruling has been made in cases involving members of orchestras.

CASES RELIED UPON BY APPELLANT AROSE UNDER DIFFERENT LEGISLATIVE ACTS AND WERE BASED UPON DISTINCTLY DIFFERENT FACTS AND CIRCUMSTANCES, AND THEREFORE ARE NOT CONTROLLING HERE.

Our case is easily distinguished from the cases relied upon by appellant.

The case of Jones v. Goodson, 121 Fed. 2nd 176, contained many facts which were considered to be controlling in that case, but which do not exist in our case. In that case the company compelled the drivers to purchase their gas and oil from the company; the company had printed rules governing the work of the drivers and could discharge the drivers for violation of the rules; the company had the right at its option to operate the taxicabs on a percentage basis, in which event the fares collected were to be divided on a specified basis; the drivers worked on a 12 hour shift; all taxicabs carried the insignia and telephone number of the company; all drivers were required to telephone the central office hourly in order that the company might know the driver was working and his whereabouts; the drivers were required to call the company in case of an accident and to make certain other reports; and if the driver refused to make calls too many times, the company could terminate his work. These and many other facts existed in that case which are not present in our case.

In the case of United States v. Vogue, Inc., 145 Fed. 2nd 609, the controlling facts easily distinguish it from the Silk case. In the Vogue case the company furnished the workers a place to work, and furnished a part of the equipment. The workers were paid regularly each week. They were subject to call by the plaintiff, and handled such matters as were turned over to

them. They did not have the right to reject the work offered to them. They maintained regular hours, the same as other employees of the store, except in dull seasons. While the workers in the Vogue case had the right to work for outside parties, the company collected for such services from the outside parties and then paid the workers. Those facts did not exist in the Silk case. In the Vogue case, the workers had no freedom as to whether or not they would perform the work offered to them, and they were not free to come and go at their own free will and accord, and were subject to call by the company.

One of the cases on which appellant relies is Grace v. Magruder, 148 F, 2nd 679. However, that case is easily distinguished from our case. In the first place, it has no application whatever to the truckers, as there are no facts or circumstances in the Grace case comparable to the truckers in the Silk case. The truckers are the principal issues in our case, both as to numbers involved and as to the amount of the tax. The unloaders are only an incidental issue. Any comparison between the hustlers in the Grace case and the unloaders in the Silk case is only slight and incidental, if there is any comparison at all. We contend the Grace case is not in point in our case in any way, and that it has no application here. There is a great difference between the work of coal hustlers and the services performed by the unloaders in our case. A coal hustler is either an extra helper who accompanies the truck driver on the delivery for the purpose of carrying or wheeling the coal to the customer's bin, or he is a worker who is sent out by the coal dealer to the residence of the customer for the purpose of carrying or wheeling the coal to the customer's bin. A coal hustler is assigned to a particular job or delivery, and he must be ready to do

the work when the delivery is made. There is no choice on his part as to when the delivery is to be made. His work is controlled entirely by the time of the delivery. Other instructions to the coal hustler are also necessary. He is instructed as to whether he should carry in the coal with a bucket or basket, or wheel it in with a wheelbarrow. In some instances it must be sprayed to avoid dust. He must also clean up the customer's yard when the work is completed. It was specifically found in the Grace case that the employer not only had the right to supervise and control the coal hustlers, but that he actually exercised that right. The court said in that case that the men worked under the "compelling supervision" of the employer. The employer in the Grace case required the coal hustlers to finish the job assigned, to get the signature of the customer, to return to the coal office and present the signed card, and receive his pay. There are no such facts or findings in our case. The court has specifically found that the respondent, Silk, neither has nor claims the right to supervise or control these unloaders, and those findings are binding here.

Appellant apparently relies upon cases which were decided under the Fair Labor Standards Act more than on cases decided under the Social Security Act. It seems very clear to us that the two acts are separate and distinct, and that the question of coverage under the two acts is entirely different. The principal case referred to by appellant is National Labor Relations Board v. Hearst Publications, 64 S. Ct. 851. However, had the Silk and the Hearst cases arisen under the same act, still the Hearst case would not be controlling in this case since the facts are very different. For instance, in the Silk case the court has specifically found and the evidence shows that there was no right of supervision by Mr. Silk over any of these workers. There was no di-

rection or control over how the work was to be done or the means and methods for accomplishing it. In the Hearst case, there was rigid supervision by a circulation manager and also a district manager and check men or main "spot" boys in the districts who were on a salary. The newsboys' compensation consisted of the difference between the price for which they sold the papers, which was fixed by the publisher, and the price they paid for the papers, which was also fixed by the publisher. The following excerpts from pages 854 and 855 of the opinion show in more detail the exact nature of the control which was exercised over the workers in the Hearst case:

"In addition to effectively fixing the compensation respondents in a variety of ways prescribe, if not the minutiae of daily activities, at least the broad terms and conditions of work. This is accomplished largely through the supervisory efforts of the district managers, who serve as the nexus between the publishers and the newsboys. The district managers assign "spots" or corners to which the newsboys are expected to confine their selling activities. Transfers from one "spot" to another may be ordered by the district manager for reasons of discipline or efficiency or other cause. Transportation to the spots from the newspaper building is offered by each of respondents. Hours of work on the spots are determined not simply by the impersonal pressures of the market, but to a real extent by explicit instructions from the district managers. Adherence to the prescribed hours is observed closely by the district managers or other supervisory agents of the publishers. Sanctions, varying in severity from reprimand to dismissal are visited on the tardy and the delinquent. By similar super-

visory controls minimum standards of diligence and good conduct while at work are sought to be enforced. However wide may be the latitude for individual initiative beyond those standards, district managers' instructions in what the publishers apparently regard as helpful sales technique are expected to be followed. Such varied items as the manner of displaying the paper, of emphasizing current features and headlines, and of placing advertising placards, or the advantages of soliciting customers at specific stores or in the traffic lanes are among the subjects of this instruction. Moreover, newsboys are furnished with sales equipment, such as racks, boxes and change aprons, and advertising placards by the publishers. In this pattern of employment the Board found that the newsboys are an integral part of the publishers' distribution system and circulation department. And the record discloses that the newsboys and checkmen feel they are employees of the papers and respondents' supervisory employees, if not respondents themselves, regard them as such."

No such facts exist in the Silk case. The Hearst case and the Silk case are therefore easily distinguishable not only for the reason that they arise under different laws, but also for the reason that the controlling facts are not at all similar.

Two cases decided by the Circuit Court of Appeals for the 6th Circuit also make a distinction about the two acts. In the case of Walling v. American Needle Crafts, 139 Fed. 2nd 760, a case was decided by that court in 1943 under the Fair Labor Standards Act which held that certain workers were covered by that act. In 1944, the same court in the case of Glenn v. Beard, 141 Fed. 2nd 376, held that certain workers who perform practically the same services as were performed in the Wall-

ing case were not employees under the Social Security Act. In pointing out the distinction between the two acts involved, that court said on page 377 of its opinion in the case of Glenn v. Beard that:

> "In the Needlecrafts case, however, the controlling factor was the broad statutory definition of employ. '"Employ" includes to suffer or permit to work.' It was held in the case above referred to that, from the legislative history of the statute in question, and of the subsequently proposed and rejected amendments thereto, there was evinced the intention of Congress, for the purpose of fair labor standards, to treat homeworkers as any other type of employee. The fact that such workers may be independent contractors does not, of itself, exclude them from the application of the Fair Labor Standards Act; they are embraced in the classification of employees, within the intendment of that statute, if they are suffered or permitted to work. But there is no such definition or provision relating to employment or employees in the Social Security Act. Without such monition, looking to the treatment of homeworking independent contractors as employees, for a special purpose, we conclude that the homework in this case is not included within that service performed by an 'employee for his employer' which is the statutory criterion for application of the provisions of the Social Security Act."

THE PRINCIPLES OF THE HEARST CASE ARE NOT APPLICABLE UNDER THE SOCIAL SECURITY ACT.

The theme of the government's brief is found in its Specification of Error number 2, on page 9, which is as follows:

> "2. The Circuit Court of Appeals erred in failing to look to the purposes of the Social Security Act and to consider the economic facts of the relationship in holding that the persons engaged in unloading and hauling coal for the respondent were not his employees within the meaning of the Act."

If that contention be not sustained, then the whole case of the government fails. To support this contention, the government cites and relies implicitly upon National Labor Relations Board v. Hearst, 322 U. S. 111. Citations of and quotations from that opinion permeate the whole brief. The case is referred to and discussed on 16 different pages of the brief.

Without the Hearst case the brief would be like the play of Hamlet, with Hamlet not upon the stage.

It is our contention and we respectfully suggest that the Hearst case does not apply to the case at bar, for two reasons.

1. It arose under a different statute,

2. The workers involved were not comparable with those at bar.

THE STATUTE.

The statute under which the Hearst case arose, is known as the Fair Labor Standards or the National Labor Relations Act, 29 U. S. C. A. 152. The question in that case was whether or not the two groups of newsboys came within the purview of the law so as to be able to compel recognition as organized unions in bargaining with the Hearst Publications. The first question that arose was whether the state laws had any application. The Court said that both the terms and the purposes of the statute as well as the legislative history show that Congress had in mind no such patch-work plan, for securing freedom of employees organizations and of collective bargaining.

The next question was whether given the intended national uniformity, the term "employee" includes such workers as these newsboys. The court held that this must be answered primarily from the history, terms and purposes of the legislation. The Court then said "the word employee is not treated by Congress as a word of art having a definite meaning. Rather, "it takes color from the surroundings in the statute where it appears."

The Court further said that Congress on the one hand was not thinking solely of the immediate technical relation of employer and employee. It had in mind, at least some other persons than those standing in the proximate legal relation of employee to the particular employer involved in the labor dispute but a wider field than the narrow technical legal relation of master and servant, as the common law has worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. It rather sought to find the broad solution, one that would bring industrial peace by substituting, so far as its power could reach, the rights of workers to self-organization

and collective bargaining for the industrial strife which prevails.

Again the Court says, that the first section of the act states its purpose which is to avert the substantial obstructions to the free flow of commerce which results from strikes and other forms of industrial strife or unrest, by eliminating the causes of that unrest, and to allow employees to organize so that they could prevent those strikes by collective bargaining. The question at issue in the Hearst Case was whether or not the newsboys were employees in such a sense that they might organize in order to deal effectively with the Hearst Publications. The Court therefore says, "The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to employees within the traditional legal distinction, separating them from independent contractors. Myriad forms of service relationship with infinite and subtle variations in the terms of employment blanket the nation's economy. Some are within the act, others beyond its coverage. Large numbers will fall fairly on one side or the other, by whatever tests may be applied. But intermediate, there may be many. The incidents of whose employment partake in part of the one group and part of the other in varying proportions of weight, and consequently, the legal pendulum for purposes of applying the statute swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand."

Congress thought it necessary to create a balance of forces in certain types of economic relationships. These do not embrace only employment associations in which controversies could be limited to disputes or proper physical conduct in the performance of the services. On the contrary, Congress recognized those economic relationships cannot be fitted neatly into the containers desig-

nated employee and employer, which an earlier law had shaped for different purposes. Its reports on the bill disclosed clearly the understanding that employers and employees not in proximate relationship may be drawn into common controversies by economic forces and that the very disputes sought to be avoided might involve employees who are, at times, brought into the economic relationship with employers who are not their employers. In this light, the broad language of the Act's definition, which in terms rejects conventional limitations on such conception as employee, employer, and labor disputes leaves no doubt that its applicability is to be determined broadly in doubtful situations by underlying economic facts rather than technically and exclusively by previously established legal classification. The purpose of the act is well shown in the opinion of the National Labor Relations Board v. Blount, 131 Federal 2d 585, which is referred to in the opinion in the Hearst case on page 129 (page 60 of the Supreme Court Reporter). In the Circuit Court Report, referred to, that Court quotes Section two 2 (3) of the Act defining employee as follows: (Legislative definition)

> "The term employee shall include any employee, and shall not be limited to the employee of a particular employer, unless the act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has obtained any other legal and substantially equivalenf employment, but shall not include any individual employed as an agricultural baroer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

The Blount decision as well as the Hearst decision indicates the reason for a broad interpretation of the word employer and employee, which justifies the definition announced in the Hearst case.

THE SOCIAL SECURITY ACT.

The Social Security Act under which the Silk case is pending, is different in its purposes and its definitions from the National Labor Relations Act.

The purpose of the Social Security Act is to raise a fund from the wages of certain employees and from contributions by employers sufficient to render secure from unemployment and want of old age the beneficiaries of the fund. The beneficiaries of the fund are so limited and the exceptions and exemptions are so great that the beneficiaries are only about 50% of the persons gainfully employed in the country so that it is not a universal law but one which is cooperative and for the benefit of the limited class covered by the act. It is not a law for general public benefit but for only those classes enumerated.

There are many wide exemptions such as domestic employees, farm hands and others who are not in any way benefited by the act. It, therefore, becomes of primary importance to define and limit the terms 'employer', 'employee' and 'employed'. These statutory definitions and provisions to be found in the appendix to the government brief at pages 61 to 63, inclusive, say that under the statutes the amounts collected are to be returned to the Treasury Department and Treasury regulations issued in connection therewith are found as regulations 90 and 91 which are printed in the government's brief in full at pages 63 to 65, inclusive.

While the Treasury regulations are not part of the statutes and, of course, could not override or be in conflict with the express terms of the statute itself, the provisions therein contained are of importance and must be given great consideration in the definition of 'employer', 'employee' and 'employment'. It is significant that in regulation 90 the Treasury Department says that the words 'employ', 'employee' and 'employer' are to be taken in their ordinary meaning.

> "Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he had the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee. *** Individuals performing services as independent contractors are not employees."

These regulations were issued early in the history of the Security Act and were in force at the time of the questions arising in this case, when the taxes were levied, and when the suit was brought to recover the taxes paid.

still remain in force, and are the pattern by which the agency is supposed to operate. The very promulgation of these regulations would seem to distinguish this case (The Silk Case) from the Hearst case. It is a different statute, the statutes are different in their purposes. In one case, no such definitions of 'employer', 'employee' and 'employment' were promulgated by the Department or Agency, and in the other case, the definitions are explicit and are in accordance with the general law regarding the legal relations between employer and employee.

The government is now asking the court to place a different and broader construction upon the statute that the Treasury Department has done and which the Congress has refused to do.

In 1939, the Congress refused to define the relationship between the owner operators of trucks like those in the Silk Case as that of employees. Such an amendment was passed by the House and rejected by the Senate. The House then receded and the bill was passed without the coverage here claimed for by the Government. The resolution was contained in the conference report of August 4, 1939, being resolution 6635 at page 14. This definite rejection of an amendment proposed, negatives the definition or interpretation now asked by the United States, and we respectfully suggest prevents the court from extending the definition suggested by the Government. This refusal on the part of Congress to interpret the law as contended for herein by the government is a complete answer to the suggestion by the Government that the Hearst case should be so extended as to be a precedent for the case at bar.

We, therefore, suggest that the difference in the laws is sufficient to distinguish the case at bar from the Hearst Case.

WORKERS INVOLVED.

Not only are the laws involved in the Hearst Case and the Silk Case different, but the workers are themselves different so that the Hearst Case is not applicable to the case at bar. The independent contractors in the case at bar have already been described and we will not repeat their status or work involved, but only suggest to the court that the workers involved in the Hearst Case belong to two classes. They are all called newsboys. One class of the newsboys was speedily disposed of as not within the definition of employees even as extended by the decision to meet the other class.

> "The papers are distributed to the consumer through a variety of channels including independent dealers, news stands, often attached to drug, grocery or confectionary stores, carriers who make home deliveries and newsboys who sell on the streets of the city and its suburbs. Only the last of these are involved in this case. The newsboys work under varying terms and conditions. They may be boot jackers selling to the general public at places other than established corners or they may sell at picked spots. They may sell only occasionally or part time or full time and they may be employed regularly and continuously or only temporarily. *The units which the board contend to be appropriate are composed of those who sell full time at established spots.* Those vendors, misnamed boys, are generally mature men dependent upon the proceeds of their sales for their sustenance and frequently supporters of families, working thus as news vendors on a regular basis often for a number of years they form a stable group

with relatively little turnover in contrast to school boys and others who sell as book jackers, temporary and casual distributors.

Overall circulation and distribution of the papers are under the general supervision of circulation managers, but for purposes of street distribution each paper has been divided into geographic districts, each district being under the direct and close supervision of the district manager. His function in the mechanics of distribution is to supply the newsboys in his district with papers which he obtains from the publisher and to turn over to the publisher the receipts which he collects from their sales, either directly or with the assistance of check men or main spot boys."

We very respectfully suggest that the Hearst case has no application to the case at bar and that the whole argument of the counsel therefore, falls to the wind.

CONCLUSION.

For the reasons herein given, it is respectfully urged that the decision of the lower court should be affirmed in its entirety.

Respectfully submitted,

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APPENDIX.

The following are copies of rulings made by the administrative agency in similar cases, and during the time involved in this case. Respondent testified that copies of these rulings had been furnished to him. These rulings were called to the attention of the trial court at the time of the oral argument, but were not introduced in evidence.

Treasury Department

July 1, 1939

Kansas Coal Co.
304 Security Bldg.
Kansas City, Mo.

Attention: Mr. Edw. C. Hanks, President

Sirs:

Reference is made to your letter dated May 23, 1939, in reply to Bureau letter dated March 14, 1939, requesting additional information for the purpose of a determination by this office of the status, under Titles VIII and IX of the Social Security Act, of truck owner-drivers who deliver coal for your Company.

It is stated that your Company enters into oral agreements with truck owner-drivers to deliver coal to various customers. Such individuals are paid on a tonnage basis, pursuant to a written agreement entered into between your Company and Local No. 541 of the International Brotherhood of Teamsters, chauffeurs, Stablemen and Helpers, a copy thereof having been forwarded with your communication. The trucks are not leased to your Company and the number necessary to make your deliveries on any particular day is dependent upon weather conditions. During the summer months you have no need for trucks, while during the rush period you may engage as many as twenty-five.

It appears that the owner-drivers pay all of the expenses incident to the operation and maintenance of their trucks. A number of the individuals in question are engaged by the Works Progress Administration and during their time off make deliveries for your Company. Also, some of the owner-drivers have ice routes or are hucksters of fruits and vegetables. The majority of these individuals solicit and haul ashes, rock, sand or other materials. It further appears that in the event your orders are not sufficient to keep the owner-drivers busy they deliver coal for other companies.

The owner-drivers are not required to report to your place of business at any specified time during the day. It appears that the drivers are given orders for deliveries in turn as their trucks arrive at your establishment. They are not required to conform to fixed hours of employment and do not perform any services for your firm other than in connection with the hauling activities. Pursuant to City Ordinance No. 5193 a copy of which was also forwarded with your letter, the trucks bear the name of your Company. You furnish the signs which are printed or painted on metal detachable plates. These plates are removed when the trucks are being used to make deliveries for other concerns. Such ordinance also provides that deliveries shall not be made before 6:00 A. M. or after 7:00 P. M. Standard time. However, the owner-drivers, within that time, may come and go as they please. The only instructions issued by you to the owner-drivers relate to the type of coal to be loaded and the addresses of the customers. The coal is chuted into the customers' bins if possible, and if not, it is dumped at the curbing. Frequently, customers engage drivers to carry the coal from the street to their bins. However, your Company does not require that those particular services be performed and therefore, you are not concerned with such arrangements. You give the owner-drivers extra copies of the delivery tickets which they are privileged to cash in at the end of each haul, day or week. When such tickets are turned in the expendi-

tures are entered into the day book as "drayage" and later posted to the ledger under the same heading. Heretofore, you have considered the owner-drivers as employees and have maintained a special social security payroll record of their payments. Forty percent of the contract drayage price was considered wages, and sixty percent truck hire and maintenance. It further appears that your Company carries contingent liability, property damage, and workmen's compensation insurance on the individuals in question. In the event a driver is discourteous to customers, addicted to drink, or repeatedly complains about hauls, you cease to give him orders for deliveries.

It is further stated that only a few of the owner-drivers engage helpers. In such event the truck owners pay the salaries of such individuals and they are not subject to your supervision with respect to the performance of their services.

Article 205 of Regulations 90, issued pursuant to Title IX of the Social Security Act, provides, in part, that the relationship of the employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done.

Substantially similar provisions are contained in Article 3 of Regulations 91, relating to Title VIII of the Act.

You are advised that, upon the basis of the facts submitted, the Kansas Coal Company does not exercise or have the right to exercise over the owner-drivers in question, or their helpers, the direction and control contemplated by the regulations referred to above as being necessary to establish the relationship of employer and employee. Accordingly, it is held that such individuals

are not your employees for purposes of Titles VIII and IX of the Social Security Act.

Respectfully

Victor H. Self
Acting Deputy Commissioner

TREASURY DEPARTMENT
WASHINGTON

OFFICE OF
COMMISSIONER OF INTERNAL REV.

March 21, 1940

Address reply to
Commissioner of Internal Revenue
And Refer to
A&C: RR: 2-C

Hoosier Coal & Oil Co.
30th Str. & L. E. & W. R. R.,
Indianapolis, Ind.

Attention: Mr. C. A. Paul
Treasurer

Sirs:

Reference is made to your letter dated Febr. 2, 1940, submitting information for the purpose of a ruling relating to the status, under Titles VIII and IX of the Social Security Act and Subchapters A & C of Chapter 9 of the Internal Revenue Code (Federal Insurance Contributions Act and Federal Unemployment Tax Act, respectively), as amended by the Social Security Act Amendments of 1939, of truck owners who deliver coal for the Hoosier Coal & Oil Co.

The information submitted discloses that the Company enters into oral agreements with truck owners whereby they furnish drivers and trucking equipment to deliver coal from the Company's yards to the customer's bins during the burning season. The truck owners are paid

on a tonnage basis, the rate per ton depending upon the circumstances peculiar to the delivery of each load of coal. All operating expenses, including the salaries of any assistants, are borne by the truck owners. The assistants are not subject to the approval of the Company and apparently may not be dismissed by it. The truck owners also haul coal for other firms. Several of them operate ice routes, while others haul trash, dirt, building materials, etc., for contractors. The truck owners also operate their trucking equipment.

The drivers are not required to report to the Company's place of business at any specified time during the day and they are not required to conform to fixed hours of employment. Pursuant to the Indiana State Law, the trucks bear the name of the Company on signs furnished by it. The only instructions issued by the Company to the drivers relate to the type of coal to be loaded and the names and addresses of the customers. The truck owners are ordinarily paid at the end of each week for the hauling services. However, on request they can secure payment on the completion of each delivery or at the end of each day.

It is held, upon the basis of the information furnished, that the truck owners and any individuals engaged to assist them, are not employees of the Hoosier Coal & Oil Co., within the meaning of Titles VIII and IX of the Social Security Act and subchapters A and C of Chapter 9 of the Internal Revenue Code, as amended, with respect to the services which they perform in hauling coal for the Company.

Respectfully,

George J. Schoeneman
Deputy Commissioner

SUPREME COURT OF THE UNITED STATES

Nos. 312 AND 673.—OCTOBER TERM, 1946.

The United States of America, Petitioner, v. Albert Silk, Doing Business as Albert Silk Coal Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
Carter H. Harrison, Individually and as Collector of Internal Revenue, Petitioner, v. Greyvan Lines, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 16, 1947.]

MR. JUSTICE REED delivered the opinion of the Court.

We consider together the above two cases. Both involve suits to recover sums exacted from businesses by the Commissioner of Internal Revenue as employment taxes on employers under the Social Security Act.[1] In both instances the taxes were collected on assessments made administratively by the Commissioner because he concluded the persons here involved were employees of the taxpayers. Both cases turn on a determination as to whether the workers involved were employees under that Act or whether they were independent contractors. Writs of certiorari were granted. — U. S. — and — U. S. —, because of the general importance in the collection of social security taxes of deciding what are the applicable

[1] Titles VIII and IX, Social Security Act, 49 Stat. 636 and 639, as repealed in part 53 Stat. 1.

See Internal Revenue Code, chap. 9, subchap. A and C.

standards for the determination of employees under the Act. Varying standards have been applied in the federal courts.[2]

Respondent in No. 312, Albert Silk, doing business as the Albert Silk Coal Co., sued the United States, petitioner, to recover taxes alleged to have been illegally assessed and collected from respondent for the years 1936 through 1939 under the Social Security Act. The taxes were levied on respondent as an employer of certain workmen some of whom were engaged in unloading railway coal cars and the others in making retail deliveries of coal by truck.

Respondent sells coal at retail in the city of Topeka, Kansas. His coalyard consists of two buildings, one for an office and the other a gathering place for workers, railroad tracks upon which carloads of coal are delivered by the railroad, and bins for the different types of coal. Respondent pays those who work as unloaders an agreed price per ton to unload coal from the railroad cars. These men come to the yard when and as they please and are assigned a car to unload and a place to put the coal. They furnish their own tools, work when they wish and work for others at will. One of these unloaders testified that he worked as regularly "as a man has to when he has to eat" but there was also testimony that some of the unloaders were floaters who came to the yard only intermittently.

Respondent owns no trucks himself but contracts with workers who own their own trucks to deliver coal at a

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[2] *Texas Co.* v. *Higgins*, 118 F. 2d 636; *Jones* v. *Goodson*, 121 F. 2d 176; *Deecy Products Co.* v. *Welch*, 124 F. 2d 592; *American Oil Co.* v. *Fly*, 135 F. 2d 491; *Glenn* v. *Beard*, 141 F. 2d 376; *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324; *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51, 53; *McGowan* v. *Lazeroff*, 148 F. 2d 512; *United States* v. *Wholesale Oil Co.*, 154 F. 2d 745; *United States* v. *Vogue, Inc.*, 145 F. 2d 609, 612; *United States* v. *Aberdeen Aerie, No. 24*, 148 F. 2d 655, 658; *Grace* v. *Magruder*, 148 F. 2d 679, 680–81; *Nevins, Inc.* v. *Rothensies*, 151 F. 2d 189.

uniform price per ton. This is paid to the trucker by the respondent out of the price he receives for the coal from the customer. When an order for coal is taken in the company office, a bell is rung which rings in the building used by the truckers. The truckers have voluntarily adopted a call list upon which their names come up in turn, and the top man on the list has an opportunity to deliver the coal ordered. The truckers are not instructed how to do their jobs, but are merely given a ticket telling them where the coal is to be delivered and whether the charge is to be collected or not. Any damage caused by them is paid for by the company. The District Court found that the truckers could and often did refuse to make a delivery without penalty. Further, the court found that the truckers may come and go as they please and frequently did leave the premises without permission. They may and did haul for others when they pleased. They pay all the expenses of operating their trucks, and furnish extra help necessary to the delivery of the coal and all equipment except the yard storage bins. No record is kept of their time. They are paid after each trip, at the end of the day or at the end of the week, as they request.

The Collector ruled that the unloaders and truckers were employees of the respondent during the years 1936 through 1939 within the meaning of the Social Security Act and he accordingly assessed additional taxes under Titles VIII and IX of the Social Security Act and Subchapters A and C of Chapter 9 of the Internal Revenue Code. Respondent filed a claim for a refund which was denied. He then brought this action. Both the District Court and the Circuit Court of Appeals[1] thought that the truckers and unloaders were independent contractors and allowed the recovery.

[1] 135 F. 2d 356.

Respondent in No. 673, Greyvan Lines, Inc., a common carrier by motor truck, sued the petitioner, a Collector of Internal Revenue, to recover employment taxes alleged to have been illegally assessed and collected from it under similar provisions of the Social Security Act involved in Silk's case for the years or parts of years 1937 through the first quarter of 1942. From a holding for the respondent in the District Court petitioner appealed. The Circuit Court of Appeals affirmed. The chief question in this case is whether truckmen who perform the actual service of carrying the goods shipped by the public are employees of the respondent. Both the District Court and the Circuit Court of Appeals[1] thought that the truckmen were independent contractors.

The respondent operates its trucking business under a permit issued by the Interstate Commerce Commission under the "grandfather clause" of the Motor Carrier Act. 32 M. C. C. 719, 723. It operates throughout thirty-eight states and parts of Canada, carrying largely household furniture. While its principal office is in Chicago, it maintains agencies to solicit business in many of the larger cities of the areas it serves, from which it contracts to move goods. As early as 1930, before the passage of the Social Security Act, the respondent adopted the system of relations with the truckmen here concerned, which gives rise to the present issue. The system was based on contracts with the truckmen under which the truckmen were required to haul exclusively for the respondent and to furnish their own trucks and all equipment and labor necessary to pick up, handle and deliver shipments, to pay all expenses of operation, to furnish all fire, theft, and collision insurance which the respondent might specify, to pay for all loss or damage to shipments and to indemnify the company for any loss caused it by the acts of the

[1] 156 F. 2d 412.

truckmen, their servants and employees, to paint the designation "Greyvan Lines" on their trucks, to collect all money due the company from shippers or consignees, and to turn in such moneys at the office to which they report after delivering a shipment, to post bonds with the company in the amount of $1,000 and cash deposits of $250 pending final settlement of accounts, to personally drive their trucks at all times or be present on the truck when a competent relief driver was driving (except in emergencies, when a substitute might be employed with the approval of the company), and to follow all rules, regulations, and instructions of the company. All contracts or bills of lading for the shipment of goods were to be between the respondent and the shipper. The company's instructions covered directions to the truckmen as to where and when to load freight. If freight was tendered the truckmen, they were under obligation to notify the company so that it could complete the contract for shipment in its own name. As remuneration, the truckmen were to receive from the company a percentage of the tariff charged by the company varying between 50 and 52% and a bonus up to 3% for satisfactory performance of the service. The contract was terminable at any time by either party. These truckmen were required to take a short course of instruction in the company's methods of doing business before carrying out their contractual obligations to haul. The company maintained a staff of dispatchers who issued orders for the truckmen's movements, although not the routes to be used, and to which the truckmen, at intervals, reported their positions. Cargo insurance was carried by the company. All permits, certificates and franchises "necessary to the operation of the vehicle in the service of the company as a motor carrier under any Federal or State Law" were to be obtained at the company's expense.

The record shows the following additional undisputed facts, not contained in the findings. A manual of instructions, given by the respondent to the truckmen, and a contract between the company and Local No. 711 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America were introduced in evidence. It suffices to say that the manual purported to regulate in detail the conduct of the truckmen in the performance of their duties, and that the agreement with the Union provided that any truckman must first be a member of the union, and that grievances would be referred to representatives of the company and the union. A company official testified that the manual was impractical and that no attempt was made to enforce it. We understand the union contract was in effect. The company had some trucks driven by truckmen who were admittedly company employees. Operations by the company under the two systems were carried out in the same manner. The insurance required by the company was carried under a blanket company policy for which the truckmen were charged proportionately.

The Social Security Act of 1935 was the result of long consideration by the President and Congress of the evil of the burdens that rest upon large numbers of our people because of the insecurities of modern life, particularly old age and unemployment. It was enacted in an effort to coordinate the forces of government and industry for solving the problems.[5] The principal method adopted by Congress to advance its purposes was to provide for periodic payments in the nature of annuities to the

[5] Message of the President, January 17, 1935, and Report of the Committee on Economic Security, H. Doc. No. 81, 74th Cong., 1st Sess.; S. Rep. No. 628, 74th Cong., 1st Sess.; S. Rep. No. 734, 76th Cong., 1st Sess.; H. Rep. No. 615, 74th Cong., 1st Sess.; H. Rep. No. 728, 76th Cong., 1st Sess. *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Helvering* v. *Davis*, 301 U. S. 619.

elderly and compensation to workers during periods of unemployment. Employment taxes, such as we are here considering, are necessary to produce the revenue for federal participation in the program of alleviation. Employers do not pay taxes on certain groups of employees, such as agricultural or domestic workers but none of these exceptions are applicable to these cases. §§ 811 and 907. Taxes are laid as excises on a percentage of wages paid the nonexempt employees. §§ 804 and 901; I. R. C. §§ 1410, 1600. "Wages" means all remuneration for the employment that is covered by the Act, cash or otherwise. §§ 811, 907; I. R. C. §§ 1426, 1607 (b). "Employment" means "any service, of whatever nature, performed . . . by an employee for his employer, except . . . agricultural labor *et cetera*." §§ 811 (b), 907 (c); I. R. C. §§ 1426 (b), 1607 (c). As a corollary to the coverage of employees whose wages are the basis for the employment taxes under the tax sections of the social security legislation, rights to benefit payments under federal old age insurance depend upon the receipt of wages as employees under the same sections. 53 Stat. 1360, §§ 202, 209 (a), (b), (g), 205 (c) (1). See *Social Security Board* v. *Nierotko*, 327 U. S. 358. This relationship between the tax sections and the benefit sections emphasizes the underlying purpose of the legislation—the protection of its beneficiaries from some of the hardships of existence. *Helvering* v. *Davis*, *supra*, 640. No definition of employer or employee applicable to these cases occurs in the Act. See § 907 (a) and I. R. C. § 1607 (h). Compare, as to carrier employment, I. R. C. § 1532 (d), as amended by P. L. 572, 79th Cong., 2d Sess., § 1. Nothing that is helpful in determining the scope of the coverage of the tax sections of the Social Security Act has come to our attention in the legislative history of the passage of the Act or amendments thereto.

Since Congress has made clear by its many exemptions, such as, for example, the broad categories of agricultural labor and domestic service, 53 Stat. 1384, 1393, that it was not its purpose to make the Act cover the whole field of service to every business enterprise, the sections in question are to be read with the exemptions in mind. The very specificity of the exemptions, however, and the generality of the employment definitions [6] indicates that the terms "employment" and "employee," are to be construed to accomplish the purposes of the legislation. As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation.[7] These considerations have heretofore guided our construction of the Act. *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358; *Social Security Board* v. *Nierotko*, 327 U. S. 358.

Of course, this does not mean that all who render service to an industry are employees. Compare *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520. Obviously the private contractor who undertakes to build at a fixed price or on cost-plus a new plant on specifications is not an employee of the industry thus served nor are his employees. The distributor who undertakes to market at his own risk the

[6] See 53 Stat. 1384, 1393, "The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—." Compare 49 Stat. 639 and 643.

[7] Nothing to suggest tax avoidance appears in these records.

product of another, or the producer who agrees so to manufacture for another ordinarily cannot be said to have the employer-employee relationship. Production and distribution are different segments of business. The purposes of the legislation are not frustrated because the Government collects employment taxes from the distributor instead of the producer or the other way around.

The problem of differentiating between employee and an independent contractor or between an agent and an independent contractor has given difficulty through the years before social legislation multiplied its importance. When the matter arose in the administration of the National Labor Relations Act, we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was "some simple, uniform and easily applicable test." The word "employee," we said, was not there used as a word of art, and its content in its context was a federal problem to be construed "in the light of the mischief to be corrected and the end to be attained." We concluded that, since that end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours and working conditions. We rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants." This is often referred to as power of control, whether exercised or not, over the manner of performing service to the industry. Restatement of the Law, Agency, § 220. We approved the statement of the National Labor Relations Board that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed

and protection afforded by the Act." *Board* v. *Hearst Publications*, 322 U. S. 111, 120, 123, 124, 128, 131.

Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case. This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the Act. The taxpayer must be an "employer" and the man who receives wages an "employee." There is no indication that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social security taxes.

The long-standing regulations of the Treasury and the Federal Security Agency (H. Doc. 595, 79th Cong., 2d Sess.) recognize that independent contractors exist under the Act. The pertinent portions are set out in the margin.[8] Certainly the industry's right to control how "work

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[8] Treasury Regulation 90, promulgated under Title IX of the Social Security Act, Art. 205:

"Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. . . . The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other

shall be done" is a factor in the determination of whether the worker is an employee or independent contractor. The Government points out that the regulations were construed by the Commissioner of Internal Revenue to cover the circumstances here presented. This is shown by his additional tax assessments. Other instances of such administrative determinations are called to our attention.[9]

So far as the regulations refer to the effect of contracts, we think their statement of the law cannot be challenged successfully. Contracts, however "skilfully devised,"

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factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

"If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

"The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

"Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees." 26 C. F. R. § 400.205. See also Treasury Regulation 91, 26 C. F. R. § 401.3.

[9] The citation of these cases does not imply approval or disapproval of the results. The cases do show the construction of the regulation by the agency. *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655; *Jones* v. *Goodson*, 121 F. 2d 176; *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324; *Texas Co.* v. *Higgins*, 118 F. 2d 636; *American Oil Co.* v. *Fly*, 135 F. 2d 491; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51.

See also note 2.

Lucas v. *Earl*, 281 U. S. 111, 115, should not be permitted to shift tax liability as definitely fixed by the statutes.[10]

Probably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship. The Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required in the claimed independent operation are important for decision. No one is controlling nor is the list complete. These unloaders and truckers and their assistants are from one standpoint an integral part of the businesses of retailing coal or transporting freight. Their energy, care and judgment may conserve their equipment or increase their earnings but Greyvan and Silk are the directors of their businesses. On the other hand, the truckmen hire their own assistants, own their trucks, pay their own expenses, with minor exceptions, and depend upon their own initiative, judgment and energy for a large part of their success.

Both lower courts in both cases have determined that these workers are independent contractors. These inferences were drawn by the courts from facts concerning which there is no real dispute. The excerpts from the opinions below show the reasons for their conclusions.[11]

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[10] *Gregory* v. *Helvering*, 293 U. S. 465; *Griffiths* v. *Commissioner*, 308 U. S. 355; *Higgins* v. *Smith*, 308 U. S. 473; *Helvering* v. *Clifford*, 309 U. S. 331.

[11] *United States* v. *Silk*, 155 F. 2d 356, 358–9: "But even while they work for appellee they are not subject to his control as to the method or manner in which they are to do their work. The undisputed evidence is that the only supervision or control ever exercised or that could be exercised over the haulers was to give them the sales ticket if they were willing to take it, and let them deliver the coal. They were free to choose any route in going to or returning. They were not required even to take the coal for delivery.

"We think that the relationship between appellee and the unloaders is not materially different from that between him and the haulers. In response to a question on cross examination, appellee did testify that

Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the

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the unloaders did what his superintendent at the coal yard told them to do, but when considered in the light of all his testimony, all that this answer meant was that they unloaded the car assigned to them into the designated bin. . . .

"The undisputed facts fail to establish such reasonable measure of direction and control over the method and means of performing the services performed by these workers as is necessary to establish a legal relationship of employer and employee between appellee and the workers in question."

Greyvan Lines v. *Harrison*, 156 F. 2d 412, 414–16. After stating the trial court's finding that the truckmen were not employees, the appellate court noted:

"Appellant contends that in determining these facts the court failed to give effect to important provisions of the contracts which it asserts clearly show the reservation of the right of control over the truckmen and their helpers as to the methods and means of their operations which, it is agreed, furnish the test for determining the relationship here in question. . . ."

It then discussed the manual and concluded:

"While it is true that many provisions of the manual, if strictly enforced, would go far to establish an employer-employee relationship between the Company and its truckmen, we agree with appellee that there was evidence to justify the court's disregarding of it. It was not prepared until April, 1940, although the tax period involved was from November, 1937, through March, 1942, and there was no evidence to show any change or tightening of controls after its adoption and distribution; one driver testified that he was never instructed to follow the rules therein provided; an officer of the Company testified that it had been prepared by a group of three men no longer in their employ, and that it had been impractical and was not adhered to."

After a discussion of the helper problem, this statement appears:

"the Company cannot be held liable for employment taxes on the wages of persons over whom it exerts no control, and of whose employment it has no knowledge. And this element of control of the truckmen over their own helpers goes far to prevent the employer-employee relationship from arising between them and the Company. While many factors in this case indicate such control as to give rise to that relationship, we think the most vital one is missing because of the complete control of the truckmen as to how many, if any, and what helpers they make use of in their operations. . . ."

unloaders in the *Silk* case were independent contractors.[12] They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act.[13] They are of the group that the Social Security Act was intended to aid. Silk was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held to be employees in tort cases.[14]

There are cases, too, where driver-owners of trucks or wagons have been held employees[15] in accident suits at tort or under workmen's compensation laws. But we

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[12] Cf. *Grace* v. *Magruder*, 148 F. 2d 679.

[13] I. R. C., chap. 9, subchap. A, § 1426 (b):

"The term 'employment' means any service performed . . . by an employee for the person employing him . . . except—

"(3) Casual labor not in the course of the employer's trade or business; . . ."

[14] *Swift & Co.* v. *Alston*, 48 Ga. App. 649; *Holmes* v. *Railroad Co.*, 49 La. Ann. 1465; *Muncie Foundry Co.* v. *Thompson*, 70 Ind. App. 157; *Chicago, R. I. & P. R. Co.* v. *Bennett*, 36 Okla. 358; *Murray's Case*, 130 Me. 181; *Decatur R. Co.* v. *Industrial Board*, 276 Ill. 472; *Benjamin* v. *Fertilizer Co.*, 169 Miss. 162.

[15] *Western Express Co.* v. *Smeltzer*, 88 F. 2d 94; *Industrial Commission* v. *Bonfils*, 78 Colo. 306; *Coppes Bros. & Zook* v. *Pontius*, 76 Ind. App. 298; *Burruss* v. *B. M. C. Logging Co.*, 38 N. M. 254; *Bradley* v. *Republic Creosoting Co.*, 281 Mich. 177; *Rouse* v. *Town of Bird Island*, 169 Minn. 367; *Industrial Commission* v. *Hammond*, 77 Colo. 414; *Kirk* v. *Lime Co. and Insurance Co.*, 137 Me. 73; *Showers* v. *Lund*, 123 Neb. 56; *Burt* v. *Davis-Wood Lumber Co.*, 157 La. 111; *Dunn* v. *Reeves Coal Yards Co., Inc.*, 190 Minn. 282; *Waters* v. *Pioneer Fuel Co.*, 52 Minn. 474; *Warner* v. *Hardwood Lumber Co.*, 231 Mich. 328; *Frost* v. *Blue Ridge Timber Corp.*, 158 Tenn. 18; *Lee* v. *Mark H. Brown Lumber Co.*, 15 La. App. 294.

See particularly *Singer Manufacturing Co.* v. *Rahn*, 132 U. S. 518.

agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors.[16] These driver-owners are small businessmen. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.

No. 312, *United States* v. *Silk*, is affirmed in part and reversed in part.

No. 673, *Harrison* v. *Greyvan Lines, Inc.*, is affirmed.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY are of the view that the applicable principles of law, stated by the Court and with which they agree, require reversal of both judgments in their entirety.

[16] Compare *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655; *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51.

SUPREME COURT OF THE UNITED STATES

Nos. 312 AND 673.—OCTOBER TERM, 1946.

The United States of America, Petitioner, 312 v. Albert Silk, Doing Business as Albert Silk Coal Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
Carter H. Harrison, Individually and as Collector of Internal Revenue, Petitioner, 673 v. Greyvan Lines, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 16, 1947.]

MR. JUSTICE RUTLEDGE.

I join in the Court's opinion and in the result insofar as the principles stated are applied to the unloaders in the *Silk* case. But I think a different disposition should be made in application of those principles to the truckers in that case and in the *Greyvan* case.

So far as the truckers are concerned, both are borderline cases.[1] That would be true, I think, even if the so-called "common law control" test were conclusive,[2] as

[1] The opinion of the Circuit Court of Appeals in the *Greyvan* case stated, after referring to *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655: "It is true that the facts of that case do not present as close a question as in the case at bar." And see note 3.

[2] It is not at all certain that either Silk or Greyvan Lines would not be held liable in tort, under application of the common law test, for injuries negligently inflicted upon persons or property of others by their truckers, respectively, in the course of operating the trucks in connection with their businesses. Indeed this result would seem to be clearly indicated, in the case of Greyvan particularly, in view of the fact that the trucks bore its name, in addition to other factors

the District Court and the Circuit Court of Appeals in each case seem to have regarded it.[3] It is even more true under

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including a large degree of control exercised over the trucking operations. For federal cases in point see *Silent Automatic Sales Corp.* v. *Stayton*, 45 F. 2d 471 (applying Missouri law); *Falstaff Brewing Corp.* v. *Thompson*, 101 F. 2d 301 (applying Nebraska law); *Young* v. *Wilky Carrier Corp.*, 54 F. Supp. 912, aff'd, 150 F. 2d 764 (applying Pennsylvania law). And see for a general collection of state cases, 9 Blashfield, Cyclopedia of Automobile Law and Practice (1941) § 6056.

Certainly the question of coverage under the statute, as an employee, should not be determined more narrowly than that of employee status for purposes of imposing vicarious liability in tort upon an employer, whether by application of the control test exclusively or of the Court's broader ruling.

[3] In the *Silk* case formal findings of fact and conclusions of law by the District Court do not appear in the record. But a "Statement by the Court" recites details of the arrangements with the truckers and unloaders in the focus of whether Silk exercised control over them and concludes he did not; hence, there was no employer-employee relation. The opinion of the Circuit Court of Appeals, though recognizing the necessity for liberal construction of the Act, treats the facts found in the same focus of control. The court was influenced by the regulations promulgated under the Act (Reg. 90, Art. 205) and also by the Bureau of Internal Revenue (Reg. 91, Art. 3). The opinion concludes: "The undisputed facts fail to establish such reasonable measure of direction and control over the methods and means of performing the services . . . as is necessary" to create the employer-employee relation. 155 F. 2d 356, 359.

In the *Greyvan* case formal findings and conclusions were filed. The Circuit Court of Appeals, accepting the findings, concluded they did not show "change or tightening of controls" after the company's adoption of a manual in 1940, although its provisions "if strictly enforced would go far to establish an employer-employee relationship. . . ." 156 F. 2d 412, 415. However, it found another factor conclusive: "While many factors in this case indicate such control as to give rise to that relationship, we think the most vital one is missing because of the complete control of the truckmen as to how many, if any, and what helpers they may make use of in their operations." 156 F. 2d at 416. Apparently not control of the method of performing the work in general but absence of expressly reserved right of control in a single feature became the criterion used

the broader and more factual approach the Court holds should be applied.

I agree with the Court's views in adopting this approach and that the balance in close cases should be cast in favor of rather than against coverage, in order to fulfill the statute's broad and beneficent objects. A narrow, constricted construction in doubtful cases only goes, as indeed the opinion recognizes, to defeat the Act's policy and purposes *pro tanto*.

But I do not think it necessary or perhaps in harmony with sound practice, considering the nature of this Court's functions and those of the district courts, for us to undertake drawing the final conclusion generally in these borderline cases. Having declared the applicable principles of law to be applied, our function is sufficiently discharged by seeing to it that they are observed. And when this has been done, drawing the final conclusion, in matters so largely factual as the end result must be in close cases, is more properly the business of the district courts than ours.

Here the District Courts and the Circuit Courts of Appeals determined the cases largely if not indeed exclusively by applying the so-called "common law control" test as the criterion. This was clearly wrong, in view of the Court's present ruling. But for its action in drawing the ultimate and largely factual conclusion on that basis, the error would require remanding the causes to the District Courts in order for them to exercise that function in the light of the present decision.

I would follow that course, so far as the truckers are concerned.